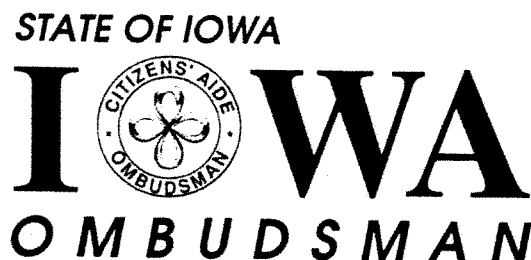


**Investigative Report
99-1**



**Investigation of the State Insurance Division's oversight of Clinton
Memorial Cemetery & Funeral Home, Inc.**

TO: Therese Vaughan, Insurance Division Commissioner

**Dennis Britson, Director
Regulated Industries Unit**

**FROM: William P. Angrick II
Iowa Citizens' Aide/Ombudsman**

RE: Case File 94-83

ISSUED: August 4, 1999

RELEASED: September 1, 1999

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INSURANCE DIVISION'S REPLY

OVERVIEW

A customer of Clinton Memorial Park Cemetery & Funeral Home, Inc., (Clinton Memorial) contacted the Citizens' Aide/Ombudsman's office (Ombudsman) on August 24, 1994.

Clinton Memorial had gone out of business. Hundreds of customers stood to lose millions of dollars in payments. She blamed the Insurance Division of the State Department of Commerce (Insurance Division), which had known about problems with Clinton Memorial for several years.

The complaint was assigned to Assistant Ombudsman Jeff Burnham. He contacted the Insurance Division to obtain a copy of its administrative order file concerning Clinton Memorial. The Ombudsman issued notice of investigation to Division Director Therese Vaughan in a December 30, 1994 letter. It identified two allegations for review:

1. The Insurance Division has failed to meet its statutory responsibility or has been unreasonably lax in the manner and timeliness of its oversight of Clinton Memorial and Clinton Memorial's efforts to correct alleged violations.
2. The Insurance Division was unreasonably tardy in notifying Clinton Memorial customers of the alleged violations.

The Ombudsman's letter presented a number of questions. The Insurance Division's response was made by Dennis Britson, Director of the Regulated Industries Unit (Unit) of the Securities Bureau of the Insurance Division. He submitted a 35-page letter supplemented by several hundred pages of documents.

The response was followed-up by a three-hour interview on February 7, 1995 involving Burnham, Britson and Tamera Watson, the Unit's investigator.

Burnham followed-up in a December 9, 1996 letter to Britson with 64 questions. Britson responded with a 46-page letter dated April 18, 1997.

The Ombudsman followed-up in a September 1, 1998 letter to Britson with 15 questions. Britson responded with a 10-page letter dated September 15, 1998.

The Ombudsman submitted a preliminary draft of this report to the Insurance Division on January 8, 1999. The Insurance Division submitted its reply on March 4, 1999 and requested a meeting with the Ombudsman. The meeting was held on July 22, 1999.

Based on the Insurance Division's written response and information gained from the meeting, the Ombudsman made revisions to the report and submitted the final draft to the Insurance Division on August 4, 1999.

ALLEGATION #1

The Insurance Division has failed to meet its statutory responsibility or has been unreasonably lax in the manner and timeliness of regulating Clinton Memorial and its efforts to correct alleged violations.

INTRODUCTION

For purposes of determining whether this allegation is substantiated, the Ombudsman will rely on the following definition of “unreasonableness”:

Unreasonableness was defined in *Churchill Truck Lines, Inc. v. Transportation Regulation Board*, 274 N.W.2d 295, 300 (Iowa 1979) to mean “action in the face of evidence as to which there is no room for difference of opinion among reasonable minds or not based on substantial evidence”.... An abuse of discretion is synonymous with unreasonableness.... It is premised on lack of rationality, and focuses on whether the agency has made a decision clearly against reason and evidence....¹

Funeral homes typically sell two types of products and services:

- At-need — purchased at the time of need.
- Pre-need — purchased before the time of need.

Sales of pre-need *funeral* items have been regulated by Iowa Code Chapter 523A (“Funeral Services and Merchandise”) since 1987. It requires sellers take one of the following steps with a consumer’s payments:

- *Trust* at least 80 percent of the payments with a financial institution.
- Buy an *insurance* policy on the customer’s life, the value of which is at least 80 percent of the consumer’s payments.
- File a *surety bond* with the Insurance Division.
- *Warehouse merchandise* and deliver a receipt of ownership to the purchaser.

Funeral homes can use combinations of these options. For example, Clinton Memorial:

- Trusted some consumers’ payments.
- Bought life insurance for other consumers’ payments.
- Used warehousing as its trusting method for two products (eternal rest beds and chapel vaults).

¹ This definition comes from *Frank v. Iowa Department of Transportation, Motor Vehicle Division*, 386 N.W.2d 86 (Iowa 1986).

According to a memo by Watson, “The main reason for this choice was the cost. An eternal rest bed costs the funeral home approximately \$200 and the selling price ranged from \$895 to \$1395. A chapel vault costs the funeral home \$525-550, and the selling price ranged from \$1595 to \$1895.”

In the February 7, 1995 interview with the Ombudsman’s office, Britson explained:

Whenever we speak of non-compliance, we always tend, by practice, to refer to the 80 percent trusting. Because if they fail to do anything else, what they’ve violated is the primary 80 percent. And that’s the way the statute is drafted. You have the 80 percent trusting but then you have alternatives to 80 percent trusting.

Some establishments also sell pre-need *cemetery* products. Such sales are regulated by Iowa Code Chapter 523E (“Cemetery Merchandise”), which was adopted in 1990. It requires at least 50 percent of each customer’s payments be held in trust until the amount equals 125 percent of the wholesale cost or the merchandise is warehoused and a receipt of ownership delivered to the purchaser.

The Unit administers Chapters 523A and 523E.² Businesses wishing to make sales under these chapters are required to obtain an “establishment permit.” These chapters authorize the Insurance Division to:

- Investigate businesses’ books, accounts, records and files.
- Have a certified public accountant audit the business, at its own cost, if the Division receives “reasonable evidence” the establishment is not in compliance.
- Suspend or revoke establishment permits.
- Request court-imposed remedies and penalties provided by Code section 714.16 (“Consumer Frauds”) upon finding a violation of these chapters.
- Apply to district court for an injunction to restrain an establishment or its employees “from engaging in conduct or practices deemed contrary to the public interest.”
- Apply to district court for a receivership if, among other things, it finds a business “has utilized trust funds for personal or business purposes in a manner inconsistent with” these chapters and the amount of funds in trust is less than required by law.

In addition, the Division has authority to attempt informal resolution of any contested case, pursuant to Code section 17A.12(5) (“Iowa Administrative Procedure Act”).

² A copy of Chapter 523A is attached as Appendix A; a copy of Chapter 523E is attached as Appendix B.

Shortly after the Ombudsman's office initially contacted the Unit, Britson gave the following figures for preneed funeral contracts in 1993 (the most recent year for which information was available at that time):

- There were 428 establishment permits.
- Approximately 9,800 preneed contracts were sold that year.
- Aggregate sales totalled over \$32 million.

FINDINGS OF FACT

More than 1,000 Clinton area residents who purchased pre-need funeral arrangements from Clinton Memorial Funeral Home and Cemetery and its owner, William Gailbreath, are concerned they will not get what they paid for — when the time comes.

Many, who are elderly, are concerned that at this time of their lives they have no way to pay for other and additional arrangements. They are frightened, worried and angry, and they want to know how perhaps millions of dollars, supposedly held in various forms of trust — have disappeared.

It was several months ago when the story began to publicly unfold. In reality, it was several years ago when state officials were alerted to the fact that the trusting activities of Clinton Memorial were questionable.

— from August 17, 1994 article in the *Clinton Herald*

SYNOPSIS

In 1991, after a year-long investigation, the Unit issued an order finding Clinton Memorial had violated Chapters 523A and 523E. It was accompanied by an agreement which set goals for Clinton Memorial to come into compliance with the trusting requirements.

Three years later, Clinton Memorial went out of business. It had more than 1,500 outstanding pre-need contracts. A civil judgment of approximately \$1.9 million was entered against Clinton Memorial and its owner agreed to pay \$1 million in victim restitution. None has been paid.

The owner also pled guilty to a criminal charge of first-degree theft and was ordered to pay \$40,730 in victim restitution. He has paid \$8,406 in criminal restitution.

This section focuses on what happened between the Unit's initial investigation and the restitution orders.³

³ Because of the length of this "Findings of Fact" section, the Ombudsman has summarized these findings in a chronology attached as Appendix C.

BACKGROUND

In early 1989, Clinton Memorial owner Richard Steffen bought 121 insurance policies on the lives of a number of pre-need customers. He spent about \$100,000 in trust monies to buy the policies. Each had a face value of \$5,000.

Clinton Memorial had to continue making annual premium payments for 10 years. Upon a customer's death:

- The proceeds would go to Clinton Memorial to pay for the products and services the customer had purchased.
- Subsequent premium payments would be reduced by the amount previously paid for that customer.

On July 3, 1989, Steffen sold Clinton Memorial to J. William Gailbreath for \$1.5 million. Steffen alleged Gailbreath also signed a promissory note worth \$200,000 and agreed to use proceeds from the 121 insurance policies as collateral.⁴

Gailbreath cancelled those policies in December 1989. Steffen sued Gailbreath for the \$200,000 promissory note. A jury awarded Steffen a \$200,000 judgment, according to articles in the *Clinton Herald* and *DeWitt Observer* newspapers.⁵

INVESTIGATION

On August 23, 1990, the Unit wrote to Gailbreath asking for assurance that adequate funds were still trusted for customers whose insurance policies were cancelled.

Gailbreath's September 11, 1990 response claimed Clinton Memorial still had sufficient funds trusted. He confirmed cancelling the policies, primarily because he claimed the annual premium payments would have exceeded \$90,000.

Over the next ten months, the Unit continued its investigation. It was complicated because Clinton Memorial's records were "inadequate, unreliable or were not compiled," Britson wrote.

The Unit has no record of whether it was able to confirm Gailbreath's claim that sufficient monies were still trusted for customers whose life insurance policies were cancelled. Britson wrote that he cannot recall how this issue was left.

⁴ It is unclear whether such an agreement would violate the trusting requirements of Chapter 523A.

⁵ The articles reported the same jury awarded a \$21,000 judgment to Gailbreath on his counter-suit for \$19,000 in loans from the corporation to Steffen and \$2,000 for four "crypt beds" transferred to Steffen before the sale. But the jury denied Gailbreath's claim for \$30,000 in earnest money.

However, the Unit's investigation did find problems:

- A May 1991 audit found no record of pre-need income going into trust funds in the first two years that Gailbreath owned the business.

For example, Clinton Memorial received \$314,405 in pre-need income during 1990 but placed none of those monies into trust, according to its 1990 annual report.⁶

- Gailbreath had sold at least 200 chapel vaults but only about 35 units were warehoused.⁷ In addition, those units were shared with another funeral home that Gailbreath owned (Memory Gardens of Iowa City). It was unclear which units were assigned to which establishment.
- Gailbreath had sold about 140 eternal rest beds but had not warehoused any units.⁸
- Including sales by the previous owner, about 1,274 eternal rest beds had been sold. The previous owner had purchased some units, but only about 125 were still in inventory.

Consumers had paid nearly \$1.5 million for this item alone. It was unclear whether the previous owner had placed any of those monies into trust, and if so, how much. Records on the previous owner's trust could not be located.

- The previous owner had sold about 700 concrete vaults and received payments totalling \$195,842. No units were warehoused. The previous owner claimed he had placed nearly 80 percent of those payments into a trust fund — and that the 121 life insurance policies had brought it to the 80 percent requirement.⁹

However, the Unit was unable to confirm how much of those monies had been trusted — those monies were no longer in trust and records on the trust could not be located.

⁶ Establishments making sales under Chapters 523A and 523E are required to submit an annual report by March 1 of each year, pursuant to Code sections 523A.2(1)(c) and 523E.2(1)(c).

⁷ "A chapel vault is a plastic container which serves as an economic substitute for both a casket (the innerburial container) and a vault (the outerburial container)," according to a September 10, 1994 article in the *Clinton Herald*.

⁸ Eternal rest beds are "fiberglass containers that do double duty as a coffin liner and vault," according to a March 23, 1995 article in the *Des Moines Register*.

⁹ After buying the insurance policies, the "Merchandise Purchase Trust" held assets worth \$446,073 on March 31, 1989, according to a report by the previous owner.

- After cancelling the 121 life insurance policies, Gailbreath used funds in the “Merchandise Purchase Trust” to buy insurance policies on the lives of approximately 226 pre-need customers. At the time, Clinton Memorial had not trusted any payments from about 68 of those customers, meaning their premiums were paid using the other 158 customers’ trust monies.

He also failed to get permission from those 158 customers whose trust monies were converted to insurance funds. Gailbreath paid approximately \$200,000 in premiums for those policies.

ESTABLISHMENT PERMIT SUSPENDED

On July 3, 1991, the Unit suspended Clinton Memorial’s establishment permit, pending a hearing to determine if there was good cause to revoke it. A cover letter stated:

*As of July 5, 1991, Clinton Memorial may not enter into any prearranged funeral contracts or prearranged cemetery contracts in which funds are paid before time of need. You may continue to accept installment payments on existing contracts provided the appropriate percentage of the full payment is placed in trust.... [emphasis added]*¹⁰

Clinton Memorial made an unlicensed sale on July 16, 1991, violating the Unit’s order. The Unit is unable to explain when and how it became aware of this unlicensed sale.

The hearing was held July 25, 1991. The Unit continued the hearing to October 15, 1991 so it could gather more information. It continued the permit suspension in the interim.

Between August 1 and October 1, 1991, Clinton Memorial made three more unlicensed sales. The Unit is unable to explain when and how it became aware of these unlicensed sales.

On October 14, 1991, the Unit cancelled the hearing and entered an order which:

- Continued the permit suspension indefinitely.
- Found Clinton Memorial had violated Chapters 523A and 523E.

Gailbreath signed a “Consent to Order,” waiving his right to a hearing and to judicial review of the findings.

The order was accompanied by a written agreement specifying a number of goals for Clinton Memorial to accomplish by March 1, 1992. It stated the Unit would reinstate the permit “upon proof that Clinton Memorial has complied with each” of the goals.

Between November 11, 1991 and April 6, 1992, Clinton Memorial made five more unlicensed sales. The Unit is unable to explain when and how it became aware of these unlicensed sales.

¹⁰ Though Clinton Memorial was prohibited from selling pre-need products and services, it still could sell at-need products and services, sales of which are regulated by the Board of Mortuary Science Examiners (Code Chapter 156).

Overall, Clinton Memorial made seven unlicensed sales in 1991, and two in 1992. Three of the 1991 sales, along with the date of sale, were listed in Clinton Memorial's 1991 annual report, received by the Unit on April 7, 1992.¹¹

There is no record of whether the Unit reviewed that report at that time and realized that Clinton Memorial had violated the suspension order. Britson wrote he cannot recall when and how the Unit became aware that Clinton Memorial was making unlicensed sales.

Clinton Memorial did not fully meet any of the goals by the deadline of March 1, 1992 (or by May 1, 1992, when the Unit issued a follow-up order). Following were the goals and any progress as of May 1, 1992:

1. Goal: Buy and warehouse 199 chapel vaults.

Progress: Clinton Memorial bought and warehoused between 26 and 61 chapel vaults.¹²

2. Goal: Buy and warehouse 140 eternal rest beds.

Progress: None.

3. Goal: For each funeral agreement converted from trust funding to insurance funding, obtain the customer's consent or replenish the trust account by the amount withdrawn to pay the premium.

Progress: Clinton Memorial had received permission from about 112 of the customers. This left 46. Clinton Memorial had withdrawn \$69,110 from the trust account to pay the premiums for these 46 customers. But it had not replenished the trust account for any of those premiums.

4. Goal: Trust 50 percent of all payments received for cemetery merchandise sold after July 1, 1990 "unless or until the amount equals or exceeds 125% of the wholesale cost of the cemetery merchandise, or the merchandise is installed," pursuant to Code section 523E.1.

Clinton Memorial needed to trust \$8,287.89 to meet this goal.

Progress: None.

5. Goal: Apply for an establishment permit for sales of cemetery merchandise pursuant to Chapter 523E.

Progress: None.

6. Goal: Submit a statement from a certified public accountant verifying physical inventory of merchandise.

¹¹ The other four sales were included but not the date of those sales, contrary to Code section 523A.2(1)(c)(5). Therefore it would not have been clear that they were made after the permit suspension became effective on July 3, 1991.

¹² It had 61 chapel vaults warehoused as of March 5, 1992. It's unclear how many had been added, since it was unclear how many of the 35 units warehoused the previous year actually belonged to Clinton Memorial.

Progress: Clinton Memorial had contacted a CPA and was preparing a report.

ESTABLISHMENT PERMIT PARTIALLY REINSTATED

In or around March 1992, Clinton Memorial claimed it was about to receive a bank loan to help resolve the trusting deficits.

Though Clinton Memorial had not fully met any of the goals, the Unit reinstated the establishment permit in a May 1, 1992 order. It prohibited Clinton Memorial from advertising or soliciting new sales.

Gailbreath signed a "Consent to Order," waiving his right to a hearing and to judicial review of the findings. The order was accompanied by a written agreement which repeated or clarified the previous goals and set the deadline for July 1, 1992.¹³

In May 1992, Clinton Memorial made two new sales. It is unclear whether the Unit determined if Clinton Memorial had solicited these sales.

As of the July 1, 1992 deadline, Clinton Memorial had made no additional progress towards the Unit's goals.

On July 30, 1992, the Unit issued a notice citing the lack of progress. It set a hearing for September 10, 1992 to determine if there was good cause to revoke Clinton Memorial's establishment permit. The Unit cancelled the hearing after contacting the bank to confirm it was in the process of approving Clinton Memorial for a loan.

By September 1992, the Unit and Gailbreath began discussing the concept of having a third-party supervisor oversee business operations.

As of December 1992, Clinton Memorial had:

- Bought and warehoused no additional chapel vaults.
- Bought and warehoused no additional eternal rest beds.
- Placed no funds in the cemetery trust.
- Obtained an unspecified number of "insurance permission slips" from the 46 remaining customers.

On December 3, 1992, the Unit issued an order appointing John T. Bribriesco as supervisor and operations manager. He was a general practice attorney and had experience as an assistant county attorney and part-time magistrate. He had no experience in the pre-need funeral and cemetery industries.

The order was accompanied by a written agreement which imposed several requirements upon Bribriesco:

¹³ The only significant change involved eternal rest beds. The initial goal required Clinton Memorial to buy and warehouse 140 eternal rest beds. The May 1, 1992 goal required it to buy and warehouse 145 eternal rest beds and at least 100 additional units each month until 1,159 were bought and warehoused "subject to adjustments for new sales, cancellations and usage."

- Requirement: Reduce fixed costs and operating expenses.

Progress: The Unit said he accomplished this primarily in two ways --

1) Restructuring the corporation's debt and debt payments. Clinton Memorial's monthly mortgage payments were reduced from \$15,078 to \$10,351.42 through a "Loan Modification Agreement" executed on December 30, 1992.¹⁴

2) Eliminating Gailbreath's salary.

- Requirement: Prepare monthly reports of business operations.

Progress: In the first four months after the order, Bribriesco submitted three letters to the Unit. The first two were one-page long and described his efforts to determine the amount of the trusting shortage. The third, dated April 2, 1993, had a detailed report concerning the amount of the shortage and his efforts to reduce it.

There was no further written communication until Bribriesco's October 12, 1993 letter, which updated the situation regarding the shortage. The Unit said it gave Bribriesco permission to submit his reports verbally, over the telephone, in the interim. The Unit has no record of what was discussed during those calls.

- Requirement: Within one month, submit a proposed operating budget "accompanied by a general business plan, *in narrative form*, for the conduct of the business pending a determination" of the statutory trusting shortages. [*emphasis added*]

Progress: Britson said the plan was presented verbally at a December 30, 1992 meeting. Britson said it "was a status quo type of plan.... The general business plan was to (1) restructure debt, (2) secure \$50,000 from First Midwest Bank as additional financing, (3) operate the funeral home and cemetery as normal, (4) to deliver pre-need merchandise and services to customers at death, and (5) use available funds to make trust deposits, purchase insurance and purchase merchandise (rest beds & chapel vaults) as necessary to eliminate the trusting deficit...."

- Requirement: Within six months, develop a plan for resolving any unfunded obligations found to exist. If no such plan was developed, Clinton Memorial would consent to the appointment of a court-appointed receiver, the agreement stated.

Progress: Britson said Bribriesco verbally submitted a plan that was satisfactory to the Unit.

¹⁴ The "Loan Modification Agreement" also stated, "In any event, the unpaid balance of all amounts due hereunder, principal and interest included, shall be due in full on August 1, 1994, or upon the sale of the mortgage premises, whichever event occurs first."

The December 3, 1992 agreement also said the Unit was to begin examining Clinton Memorial's statutory obligations "with a view toward completing the examination ... within six months."

In December 1992, Clinton Memorial made two new sales. It is unclear whether the Unit determined if Clinton Memorial had solicited these sales (prohibited by the May 1, 1992 order).

On December 30, 1992, Clinton Memorial executed a loan agreement for \$153,514.20 with First Midwest Bank of Moline, Illinois. The loan had two parts:

- \$103,514.20 was the amount that Clinton Memorial was past due on its mortgage with the bank.
- An additional \$50,000 was to be used exclusively to satisfy the Unit's requirements.

In late December 1992, Bribiesco addressed a letter to the Unit. It referenced a conversation in which Britson tentatively approved lifting the prohibition against soliciting new sales, on three conditions:

1. Bribiesco had to give "a good faith estimate of the total shortage of funds that need to be trusted."
2. "An amount sufficient to cover the estimated shortage be placed in escrow under my [*Bribiesco's*] control to be used to replace that shortage once that number is verified."
3. "Income statements and budgets be provided to demonstrate that Clinton Memorial is a 'viable' business...."

Bribiesco's letter then stated:

It is my determination, based on preliminary figures that I have calculated, that the shortage in trust is in the approximate sum of \$40,000.00-\$50,000.00. I have attached a draft copy of a Loan Agreement that provides for me to have \$50,000.00 at my disposal to refund the trust.

I have attached copies of the income statement for an eleven month period ending May 31, 1992, and a budget for 1993.¹⁵

I hereby request that permission to pre-sell be given upon the above conditions, and with the understanding that if the Securities Bureau feels that Clinton Memorial is not complying with any requirements imposed by your office, then the pre-sales would immediately be resuspended.

¹⁵ The income statement was for Clinton Memorial Park Cemetery (not including Clinton Memorial Funeral Home). It is unclear why Bribiesco submitted an income statement for the cemetery but not the funeral home. The document showed Clinton Memorial Park Cemetery had a net operating loss (before taxes) of \$615,237.20 for the 11-month period ending May 31, 1992. It is unclear why Bribiesco did not submit a more recent income statement (the document was seven months old when submitted).

ESTABLISHMENT PERMIT FULLY REINSTATED

On January 22, 1993, the Unit issued a revised order authorizing Clinton Memorial to solicit pre-need sales. The order was subject to an agreement which stated in part:

- John T. Bribriesco has undertaken an initial investigation and, based upon information currently available, has calculated an estimated trust fund shortage *for the period of Mr. Gailbreath's ownership of Clinton Memorial*, in the range of \$40,000 - \$50,000.... [*emphasis added*]
- Clinton Memorial will conduct an internal financial audit of sales made under Chapters 523A and 523E to determine the trust fund shortage for the period of Mr. Gailbreath's ownership of Clinton Memorial.

... Immediately following that calculation, the smaller of \$50,000 or the calculated amount shall, if not previously deposited, be deposited in trust.

- If the internal audit is not completed by March 15, 1993, the entire \$50,000 shall be transferred into Clinton Memorial's trust account.
- If the internal audit shows an unfunded liability in excess of \$50,000, Clinton Memorial shall, prior to May 1, 1993, present a proposal to the Insurance Division for funding the additional liability.

On March 17, 1993, the Unit received Clinton Memorial's annual report for 1992. It showed Clinton Memorial, during 1992, received \$176,907 for pre-need contracts sold in previous years, *but had deposited none of those monies in trust*. [Britson claimed the Unit did not receive that report until November 1993, but it is date-stamped as being received March 17, 1993.]

That report also listed the two unlicensed sales made in 1992, but did not indicate the date of sale, contrary to Code section 523A.2(1)(c)(5).

On March 18, 1993, the Unit sent a letter to Gailbreath requesting documentation that the \$50,000 had been transferred into the trust account (as required by the January 22, 1993 agreement).

On April 2, 1993, Bribriesco submitted a letter to the Unit stating in part:

As you can see from the attached documents, the shortages were larger than anticipated, but I have been able to make up a very significant amount in a short period of time. It is vital that Clinton Memorial be allowed to continue to pre-sell. If so, I believe that we can eliminate the remaining deficit very soon.

The letter was accompanied by a report that indicated:

- Chapel vaults: There was a shortage of 83 units — 147 customers had bought a chapel vault, but only 64 units were warehoused.

However, Bribiesco had ordered 38 additional units with \$25,000 of the loan proceeds. Once those units arrived, the shortage would be about 45 units.

- Eternal rest beds: There were 78 outstanding customers who had bought an eternal rest bed during Gailbreath's ownership and 100 units were in inventory. So there was an excess of 22 units, Bribiesco claimed.

But the Unit disagreed with Bribiesco's logic, because all of the warehoused units were put there by the previous owner. Britson wrote, "By our calculations, Gailbreath had outstanding sales of 78 rest beds. By our calculations, his predecessor (Steffen) had sold 979 rest beds. We took the position that he was required to warehouse 78 rest beds or trust 80 percent of the payments received from his customers."

- Other 523A contracts: The shortage in trust was \$40,192.66. It had been \$101,179.66 until March 15, 1993, when Bribiesco used \$25,000 in loan proceeds and \$2,142.40 from the trust account to buy life insurance policies worth \$60,987.

In April 1993, Gailbreath sold Memory Gardens to Terry Campie.

While Bribiesco's updated figures showed an unfunded liability in excess of \$50,000, there is no record that Clinton Memorial presented a proposal by May 1, 1993 for funding the additional liability (as required by the January 22, 1993 agreement).

On October 12, 1993, Bribiesco submitted a report to the Unit indicating:

- Chapel vaults: There was a shortage of 57 units on September 30, 1993 (the shortage had grown due to additional sales). With 55 additional units ordered and expected to be delivered by November 1, 1993, the shortage would then drop to two units.
- Eternal rest beds: "Since my last report, a revised schedule ... has been prepared showing that 962 rest beds are needed, in addition to those in inventory...."
- Other 523A contracts: The shortage was still \$40,192.66.

The Unit conducted an audit at Clinton Memorial from December 1-3, 1993. Britson wrote that the audit found failures to trust all contract payments and "that the chapel vault inventory of Clinton Memorial and Memory Gardens was still commingled and not adequately identified."

Britson also wrote that:

... no trusting was being done until payment in full was received, instead of trusting as payments came in. In addition, in some months they waited to make a trust payment even on a fully paid contract.

On December 8, 1993, the Unit issued a subpoena duces tecum to Gailbreath commanding him to submit:

- All ledgers and journals for cash receipts and accounts receivable for calendar years 1992 and 1993.
- All monthly bank statements of Clinton Memorial and related trust accounts for calendar years 1992 and 1993.
- Any records identifying the ownership of warehoused merchandise.

On February 1, 1994, the Unit met with Gailbreath, Bribriesco, and representatives from the Attorney General's office and First Midwest Bank. Gailbreath admitted not trusting for new accounts.

ESTABLISHMENT PERMIT SUSPENDED AGAIN

On February 4, 1994, the Unit suspended Clinton Memorial's establishment permit.

Before that re-suspension order, Clinton Memorial had made 26 new sales since the permit was fully reinstated on January 22, 1993.

Between February 21, 1994 and June 14, 1994, Clinton Memorial made five unlicensed sales. It is unclear when and how the Unit became aware of these unlicensed sales.

On March 17, 1994, the Unit received Clinton Memorial's annual report for 1993. It showed \$120,505 in pre-need income was received (for sales under both Chapters 523A and 523E) but only \$5,540 was trusted (less than 5 percent).

On March 24, 1994, Britson met with Campie, the new owner of Memory Gardens. They discussed the chapel-vault inventories of Memory Gardens and Clinton Memorial, which had recently been separated. Campie claimed Memory Gardens was missing some items after the separation.

Between May and July 1994, Clinton Memorial bought and warehoused 28 eternal rest beds.

Clinton Memorial defaulted on its mortgage with First Midwest Bank. On July 5, 1994, First Midwest Bank exercised its rights as first mortgagor and took the deed to the property and assets of Clinton Memorial, initiating the non-judicial foreclosure process.

Also on July 5, 1994, the Unit issued a notice to Gailbreath setting a hearing on whether there was good cause to revoke Clinton Memorial's establishment permit. The hearing was dismissed after Gailbreath voluntarily surrendered the permit.

RECEIVERSHIP

On August 1, 1994, the Attorney General's office, on behalf of the Unit, filed a "petition for receivership, temporary and permanent injunctive relief and other equitable relief" in Clinton County District Court. The 10-page petition stated in part:

Upon information and belief, Gailbreath and Clinton Memorial conspired to misappropriate and eventually did misappropriate, merchandise from another funeral home that was previously owned and operated by Gailbreath.

At the time, Clinton Memorial had more than 1,500 pre-need contracts, according to a press release by the Attorney General's office. The press release stated:

- The bank plans to sell most of the assets of Clinton Memorial to Gary Nelson, a funeral director with operations in DeWitt and LeClaire, Iowa. Nelson plans to operate the Clinton facility as the Nelson Funeral Home and Clinton Lawn Cemetery.
- The sale is for assets only -- including the funeral home building, the mausoleum and the cemetery property. The sale does not include the existing Clinton Memorial corporation itself, nor the liabilities or debts of Clinton Memorial -- *including the under-trusted prearranged funeral agreements. [emphasis added]*
- Under supervision of the State Superintendent of Securities [*who oversees the Unit*] and the Court, the receiver ... would have responsibility to preserve and protect trust funds and merchandise that do exist, and develop a plan for distribution of those assets.¹⁶
- Although not obligated to do so, Nelson said he plans to offer to enter into new contracts with Clinton Memorial customers that include credits for most payments made to the previous owners.

More information about Nelson's offer was provided in an August 1, 1994 letter from the Unit to customers. It stated in part that Nelson:

... will offer all Clinton Memorial purchasers a credit for the amount paid to the former owners, not including amounts prepaid for open and closings or cash advance items. People who purchased a chapel vault from Clinton Memorial will receive a chapel vault, or a credit of up to \$1,599, if they assign their interest in the chapel vault inventory and if Nelson Funeral Home conducts their funeral service.

... You will be offered an opportunity to (1) enter into a guaranteed price prearranged funeral agreement at current prices with the Nelson Funeral Home (*an additional payment would be likely in most cases*), (2) enter into a nonguaranteed price prearranged funeral agreement with the Nelson Funeral Home (the prices would be set at the time of need and reduced by the amount of the credit), or (3) to receive a credit certificate ... which

¹⁶ When the buyer of an establishment does not assume underfunded pre-need contract obligations, Code sections 523A.4(4) and 523E.2(4) require all funds and merchandise held in trust be distributed to consumers.

could still be applied toward the cost of services and merchandise purchased at the time of need. The credit certificate does not entitle you to a cash payment. Also, the credit is not transferable. [*emphasis added*]

You will have the opportunity to accept or reject his offer to enter into a new contract.

Following an August 18, 1994 hearing, a district court judge approved the receivership application and appointed Britson as receiver.

On September 7, 1994, Britson and Assistant Attorney General Traci Weldon attended two public meetings in Clinton to discuss the situation and answer questions from Clinton Memorial customers. About 240 people attended, including three legislators.

On September 14, 1994, Gailbreath was arrested on one count of first-degree theft. He was later released on bail of \$13,000. The Clinton County Attorney later filed a "trial information" alleging Gailbreath:

... did unlawfully and willfully obtain a transfer of possession, control or ownership of the property of another by deception, where the value exceeds ten thousand dollars.

The minutes of testimony identified 13 customers who would testify as to the amount and timing of payments made to Clinton Memorial pursuant to pre-need contracts. It also stated Britson would testify that the payments made by those customers "exceed amounts warehoused, insured, trusted, or bonded by \$38,258.71. No accounting of that amount is available."

On September 16, 1994, the Attorney General's Office filed an amended petition which named Bribriesco as a co-defendant and sought restitution and civil penalties. Bribriesco ultimately agreed to pay \$13,000 to Clinton Memorial's undertrusted obligations.

On November 7, 1994, Britson, in an affidavit submitted to the court as receiver, indicated there were 37 complete chapel vaults in inventory (units with both an exterior and an interior) and 55 chapel vault exteriors.

On November 30, 1994, Britson submitted a report to customers indicating:

- Chapel vaults: There were 145 outstanding purchasers, 114 of whom were paid in full and had been issued sequentially numbered warehouse receipts from the manufacturer.

Britson said he was going to propose the 37 complete units go to the first 37 customers who were assigned a chapel vault; and the 55 exteriors go to the next 55 customers who were assigned a unit.

- Eternal rest beds: There were 84 eternal rest beds in inventory and 1,018 outstanding purchasers. Unlike the chapel vaults, no receipts or numbering system existed.

Britson said he was going to propose the eternal rest beds be distributed by a random drawing from the entire list of purchasers.

- Other 523A contracts: 109 customers had a combined total of \$83,150.22 in Clinton Memorial's "prepaid combined funeral trust" account and needed to file a written claim to get their money.

And 323 customers had a combined total of \$502,613 worth of life insurance policies, with the funeral trust as the beneficiary. The report encouraged customers to change the beneficiary.

Overall, Clinton Memorial made 44 new pre-need sales following the Unit's October 14, 1991 order. Each of the 44 customers lost money on their payments, a total of \$84,195.

Included were 14 unlicensed sales where the customers lost a combined total of \$19,709.

Following a December 6, 1994 hearing, a district court judge approved Britson's proposal for distributing the chapel vaults.

On December 15, 1994, Gailbreath pled guilty to the charge of first-degree theft. He was later sentenced to serve up to 10 years in prison. In addition, Gailbreath was ordered to pay \$40,729.88 in restitution to the 13 customers whose losses were the subject of the criminal charge. (As of December 18, 1998, he had paid \$8,406 in criminal restitution.)

Following a hearing in early 1995, a district court judge approved Britson's proposal for distributing the eternal rest beds. The drawing was held March 22, 1995.

As receiver, Britson marshalled \$1,613,649 worth of trust funds and trust assets. All but \$372 was returned to consumers.

On June 5, 1995, a default judgment in the amount of \$1,918,287 was entered against Clinton Memorial. On February 22, 1996, the Attorney General's office and Gailbreath entered into a consent judgment whereby Gailbreath would pay \$1,000,000 for victim restitution. (As of December 18, 1998, Gailbreath had paid none of the civil restitution.)

ANALYSIS AND CONCLUSIONS

SYNOPSIS

When Clinton Memorial went out of business in 1994, about 1,500 pre-need customers stood to lose a combined \$3.5 million.

About \$1.6 million was later returned to consumers by Britson as receiver, leaving about \$1.9 million in losses.

Those losses were potentially reduced through credits offered by the new owner and insurance claims.¹⁷ The Unit was unable to provide any specific figures. The credits, however, didn't apply to payments for "cash advance" items or grave "openings and closings."¹⁸

For those who accepted the credit offer, most still had to make an additional payment. And for those who rejected the credit offer, it's unlikely all were reimbursed by insurance claims.

More importantly, however, the Ombudsman's investigation found:

- There is insufficient information to conclude that Clinton Memorial's trusting deficit was reduced during the "work out." The trusting deficit may have actually increased during the "work out."¹⁹
- The vast majority of pre-need customers who made payments after the "work out" began *lost* money. Some lost thousands of dollars.
- Some of the losses could have been reduced or even avoided if the Unit had acted on a number of *warning signs*. Included was information in two of Clinton Memorial's annual reports — the Unit merely had to read the reports to see the warning signs, nothing particularly complicated or time-consuming.

Britson indicated there were no signs of problems — stating in part, "we didn't have anything indicating a problem but the problems were occurring." The record indicates otherwise.

¹⁷ Britson wrote that the Unit, during the receivership phase, recommended customers file insurance claims regarding their losses. It is unknown how many filed successful claims and how much their aggregate losses were reduced.

¹⁸ Of the approximately 1,500 outstanding contracts, it is unclear how many involved items not covered by the credit offer. However, according to information provided by the Unit, Clinton Memorial received payments on 306 pre-need contracts from 1992 through 1994. Of those, 36 (about 12 percent) involved "openings and closings" and/or "cash advance" items.

¹⁹ "Work out" is a term Britson has used in reference to the period after the Unit's October 14, 1991 order and the accompanying goals set for Clinton Memorial. The goal of the "work out," as described by Britson, was to eliminate the statutory trusting deficits through continued business operations.

BASIS FOR "WORK OUT"

The Unit was at a crossroads in October 1991.

On one hand, its year-long investigation of Clinton Memorial — complicated by inadequate and missing records — had found several statutory violations. Technically, the Unit had authority to impose fines, apply for a court-appointed receivership, or move to revoke Clinton Memorial's pre-need establishment permit.

On the other hand, the violations didn't appear to be intentional and were not as severe as initially believed. Nor were they as severe as those in other cases. While technically in violation, Clinton Memorial's problems were not as significant as the Unit's "early discoveries" in other similar cases. Britson cited one where the establishment had "absolutely no money in trust" and another which had "388 checks of required trust payments written but not deposited."

In comparison, Britson wrote, Clinton Memorial's problems:

... appeared to be mostly a matter of how they were doing things, not what they were doing. It appeared Clinton Memorial was not using the correct methods and procedures. It had the appearance of a misunderstanding of the statutory requirements by a new owner, Gailbreath, who may also have received bad advice from a variety of sources.

Britson also knew that, in the previous four years of regulating the pre-need funeral industry, taking severe enforcement actions tended to harm the establishment — and ultimately harmed the very consumers the Unit was trying to protect.

As a result, Britson wrote, the Unit decided to try a new approach with Clinton Memorial:

None of the other methods used up to that time (receiverships or bankruptcies) had been "consumer friendly." If successful, a "work out" would have been consumer friendly.

... Consumers usually do not come out well in situations where the business has a foreclosure, bankruptcy, etc. We believed that with the large client base, the level of business involved at the funeral home and cemetery and the large spread between the retail and wholesale prices, a rehabilitation was possible.

This explains the Unit's October 14, 1991 order and the accompanying goals. Under the circumstances, the Ombudsman admires the Unit's decision to try this new approach, with the ultimate goal of helping Clinton Memorial's customers.

The Unit's follow-through, however, was inadequate. After finding statutory violations had already occurred, the complex and abstract nature of the pre-need funeral industry obligated the Unit to proactively look for any further signs of trouble. But the Unit either wasn't looking for them or failed to appreciate their significance.

WARNING SIGN #1: UNLICENSED SALES

As you may have heard, in 1991 the Insurance Division discovered violations of the trusting and warehousing requirements under prearranged funeral agreements issued by Clinton Memorial....

The Division quickly took steps to prevent further violations by suspending new sales....

— from Britson’s August 1, 1994 letter to Clinton Memorial customers

The Ombudsman takes issue with this statement in view of this fact: *Clinton Memorial violated the suspension order at least nine times in 1991 and 1992 but the Unit didn’t do anything about it because it apparently wasn’t even aware of it.*

In the three months before the “work out” even began, Clinton Memorial made four unlicensed sales. Each one violated the Unit’s July 3, 1991 order, which suspended Clinton Memorial’s license and specifically prohibited any such sales.

The fact that it was willing to violate a direct order by the regulatory agency should have raised legitimate questions, at that time, about Clinton Memorial’s capacity to resolve the trusting shortages. At a minimum, those unlicensed sales *demand*ed that the Unit document them in a letter putting Clinton Memorial on notice that any further unlicensed sales would be unacceptable.

But nothing in the record suggests the Unit was even aware of those unlicensed sales when it initiated the “work out” effort through the October 14, 1991 order. That order detailed the Unit’s findings concerning four statutory violations, but did not mention the fact that Clinton Memorial had also been making unlicensed sales.

Asked when the Unit became aware of the unlicensed sales, Britson said there is no record and he no longer recalls.

As a result, it appears the Unit initiated the “work out” without determining whether Clinton Memorial had complied with the previous order — and without holding Clinton Memorial accountable for violating it.

Clinton Memorial’s establishment permit remained suspended following the October 14, 1991 order. But it made five more unlicensed sales between that order and the next one, issued May 1, 1992.

Once again, nothing in the record suggests the Unit was even aware of the unlicensed sales — now totalling nine — when it partially reinstated Clinton Memorial’s establishment permit in the May 1, 1992 order.

This second failure is even more serious: Three of the unlicensed sales were identified in Clinton Memorial’s 1991 annual report, *which the Unit received a few weeks before reinstating the establishment permit in the May 1, 1992 order.* The Unit merely had to read that report to learn that Clinton Memorial had been violating the suspension order.

It's worth noting that the 1991 annual report failed to include the date of all new sales, as required by Code section 523A.2(1)(c). As a result, while the other four unlicensed sales in 1991 were included in the report, there was no way to tell whether they were made while the license was suspended. While the Unit should have required Clinton Memorial to amend its report to include the dates for *all* new sales, it didn't.

In the end, each consumer in the nine unlicensed sales between July 3, 1991 and May 1, 1992 lost money, a total of \$11,300. Most of those consumer losses could have been avoided or reduced had the Unit taken reasonable steps to ensure Clinton Memorial did not make any such sales, which not only violated the suspension orders but also were not part of the original "work out" premise.

Even after the Unit again suspended Clinton Memorial's establishment permit on February 4, 1994, four new sales were made. Each of those customers also lost money on their payments, a total of \$8,409.

WARNING SIGN #2: LITTLE PROGRESS TOWARDS GOALS

Seven months after the "work out" began, Clinton Memorial had not fully met any of the goals it had agreed to. Of particular significance were its failures to:

- Buy and warehouse *any* eternal rest beds (goal had been to obtain 140).
- Trust *any* monies received from payments for cemetery merchandise (needed to trust about \$8,500 to meet the goal).
- Apply for a Chapter 523E establishment permit, *which was free of charge*. [Code section 523E.9(3) waives the \$50 fee for establishments that already have a Chapter 523A permit.]
- Submit a statement from a certified public accountant verifying the physical inventory of merchandise delivered in lieu of trusting.

The first two failures should have raised questions about what Clinton Memorial was doing with pre-need income, as well as profits from at-need sales. It appears there was sufficient pre-need income to have made at least some progress regarding the eternal rest bed and cemetery trust shortages.

The Unit submitted a spreadsheet listing pre-need installment payments by individual customers from 1991 through 1994. The spreadsheet shows Clinton Memorial received \$17,363 from 69 customers in 1991 in connection with pre-need sales of eternal rest beds — and 36 of those customers submitted payments exceeding the approximate wholesale cost of \$189.

In light of this information, Clinton Memorial's failure to buy and warehouse *any* eternal rest beds in all of 1991 and the first four months of 1992 should have alarmed the Unit.

Similarly, the income statement for the 11-month period ending May 31, 1992 shows Clinton Memorial received \$9,538.30 in connection with sales of pre-need "markers and bases." Given that income, it is unclear why no funds were in the "marker trust" as of May 1, 1992.

Why was Clinton Memorial unable to make *any* progress towards these goals? We may never know. It appears the Unit was not proactively looking for any such warning signs and continued the “work out” through its May 1, 1992 order without getting some answers.

The Unit relied on two signs of progress in continuing the “work out” and partially reinstating the establishment permit. Most notably, Clinton Memorial had bought and warehoused between 26 and 61 additional chapel vaults in the first seven months of the “work out.” Though falling far short of its goal (199 chapel vaults), this was a good start.

The other sign of progress was that Clinton Memorial received permission from about 112 of the 158 customers from whom it had failed to get permission before converting their trust monies into insurance policies. Since the Unit was requiring Clinton Memorial to replenish the trust account by the amount of the premium paid on any customer who would not give permission, this also was a good start.

However, those two signs of progress did not outweigh the above-mentioned failures, which should have caused the Unit to reconsider allowing the “work out” to continue.

The Unit said there was an additional, significant factor behind its May 1, 1992 partial reinstatement of the establishment permit: Clinton Memorial claimed it was about to be approved for a bank loan.

Britson’s written comments about the loan bear close analysis:

- *The bank financing was crucial, because everyone agreed and assumed that Clinton Memorial would not have had sufficient revenue from cash flow to fund the trusting deficits at issue within a reasonable time period.*

It is unclear how the Unit, without conducting an audit at that time, could have concluded Clinton Memorial’s cash flow was not sufficient to resolve the shortages in a “reasonable time period.”

Further, as previously shown, Clinton Memorial had cash flow for some items and *still* was making no progress.

- *In addition, we felt the bank’s analysis ... was an indication of their belief that a workout was a possibility.*

The trouble with this was that the bank (First Midwest) held Clinton Memorial’s first mortgage. As long as Clinton Memorial had significant statutory shortages, First Midwest had a clear motive for continuing the “work out” effort — it stood to lose money on the mortgage. (As it turned out, First Midwest lost an undisclosed amount of money on the first mortgage, according to Britson.)

As a result, the Unit should not have been relying on the first mortgagor’s analysis in determining the feasibility of the “work out.”

- ... we were under the understanding at that time that the bank would provide the amount necessary to satisfy the stated conditions [in the May 1, 1992 order].

... our decision was based on large part upon representations made by Bribriesco and our review of information he provided.

It is unclear what independently verifiable information the Unit relied upon in forming this opinion. The Unit acknowledges it did not contact the bank until several months after the May 1, 1992 order.

As it turned out, the loan — executed eight months later — was for the amount of \$153,514.20. That amount would not have come anywhere close to fulfilling the goals in the May 1, 1992 agreement — which would have taken at least \$355,694, as shown by the following table:

<i>ITEM</i>	<i>MAY 1, 1992 GOAL</i>	<i>Money needed to accomplish</i>
<i>Eternal rest beds</i>	Needed 1,159 units	\$219,051 ²⁰
<i>Chapel vaults</i>	Needed 199 units	\$128,355 ²¹
<i>Cemetery trust</i>	Needed to trust \$8,288	\$8,288
<i>Insurance fund conversions</i>	Needed permission from about 46 others	up to \$69,110 (depending on how many would give approval)
<i>TOTAL</i>	NA	\$355,694 -- \$424,804

In the seven months between the May 1, 1992 and December 3, 1992 orders, Clinton Memorial made even less progress than it had in the first seven months of the “work out:”

- It bought no additional chapel vaults or eternal rest beds.
- It placed no funds in the cemetery trust.
- It obtained an unspecified number of “insurance permission slips,” in addition to the 112 previously received.

The general lack of significant progress in the first 14 months of the “work out” demanded that the Unit, before allowing the “work out” to continue, determine what Clinton Memorial had been doing with pre-need income received over that time.

²⁰ This figure is based on Britson’s statement that the warehouse price for eternal rest beds was \$189.

²¹ This figure is based on Britson’s statement that the warehouse price for chapel vaults was \$645.

Instead, the Unit appointed a third-party attorney as operations manager and allowed him to try to determine the amount of the statutory shortages. Since more than two years had elapsed and the Unit had not been able to determine the exact shortage, it is unclear why anyone would believe that Bribiesco — with little or no experience in the pre-need funeral industry — could do so any more quickly than the Unit (and accurately).

Overall, it appears the Unit may have mistakenly assumed that, after it explained the proper trusting procedures in 1991, Clinton Memorial would follow them. It didn't. And the Unit would have known that had it been proactively looking for warning signs.

PERMIT FULLY REINSTATED

Shortly following the 14-month period of little progress, the Unit completely reinstated Clinton Memorial's establishment permit, allowing it to solicit pre-need sales. The Unit did so even though it objected to the idea. Britson wrote that Bribiesco believed:

... that preneed sales would generate a significant amount of current cash flow for Clinton Memorial. Because of the tendency of their customers to make small payments over time and the normal industry practice of paying sales commissions upfront, *this just wasn't the case*. If sales commissions are paid up front, it provides limited (sometimes even negative) initial cash flow. [*emphasis added*]

Given the Unit's concerns, the general lack of significant progress, and the failure to verify that Clinton Memorial was trusting pre-need income in compliance with the statutes, the decision to fully reinstate Clinton Memorial's establishment permit was unsupportable and unreasonable. Twenty six new customers ultimately lost a total of \$49,850 as a result of this decision.

The Unit has indicated its decisions to continue the "work out" and reinstate the establishment permit were dominated by the pending bank loan, which was finally executed on December 30, 1992.

Certainly, the loan was significant. But it appears that prospects of the loan caused the Unit to lose sight of an important fact: *Over the first 14 months of the "work out," Clinton Memorial was receiving pre-need income and should have been able to use those monies to make significant progress — and it was making very little progress.*

And while the loan would give Clinton Memorial a temporary cash flow "shot in the arm," it would have to be paid back, reducing the amount of other income available to resolve the shortages — which was critical, since the loan proceeds were not nearly sufficient to resolve the shortages.

WARNING SIGN #3: ESTABLISHMENT'S REPORT OF WIDESPREAD FAILURE TO TRUST PAYMENTS

Less than three months after fully reinstating the establishment permit, the Unit received Clinton Memorial's annual report for 1992. The cover page — stamped as being received on March 17, 1993 — shows Clinton Memorial in 1992 received about \$177,000 for pre-need contracts sold in previous years, *but had trusted none of those monies*.

This was a significant “warning sign.” And Britson agreed with that assessment. He wrote the 1992 annual report “reflected new sales and installment payments, but no new trusting.” He indicated that report triggered the December 1993 audit which found the problems were even more extensive.

Trouble was, the Unit did not act on this sign for about eight months. Why? Britson claimed Clinton Memorial did not submit this particular document on time:

Clinton Memorial finally sent us a 1992 report in late November of 1993
(there was no date stamp on the report).

But the copy he provided to the Ombudsman has a date stamp showing it was received by the Securities Bureau on March 17, 1993.

It is unclear why the Unit failed to respond to that annual report immediately and why Britson claimed it was not submitted until eight months later. Whatever the reasons, the Unit's failure to respond gave Clinton Memorial another eight months to misappropriate pre-need income and merchandise.

SELECTION OF OPERATIONS MANAGER

The Ombudsman's review of media reports indicates there was some controversy over the Unit's selection of Bribiesco as operations manager, since he and Gailbreath had been childhood acquaintances.

In an interview with the Ombudsman's office, Britson explained the decision to appoint Bribiesco:

We kind of had the impression that this [*Gailbreath*] was someone who may just not have been a good businessman, may not have really taken the care to read the statutes, or may not have understood what the legal requirements were. And we felt that if we had an attorney there that he would be able to know what the requirements were and to give some good, sound advice as to how to practice business.

Britson also said the Unit did not know of anyone else in the Clinton area capable of performing the third-party supervisor's duties. As a result, he said Bribiesco was essentially nominated by Gailbreath.

While the selection of Bribiesco was not an ideal situation, the Ombudsman does not find it to have been unreasonable. In a town the size of Clinton, there are times when an apparent and potential conflict of interest is unavoidable. Further, there is no indication the relationship between Bribiesco and Gailbreath actually contributed to the problems associated with Clinton Memorial and its ultimate demise.

LAX AND INCONSISTENT OVERSIGHT OF OPERATIONS MANAGER

The Unit's December 3, 1992 order appointed Bribiesco as operations manager. The order was accompanied by an agreement which imposed specific requirements upon Bribiesco, apparently in an effort to closely monitor his activities to ensure progress was being made.

However, the Unit acquiesced on the formality of several of the requirements. The agreement required Bribiesco to:

- Submit a proposed operating budget, within one month, "accompanied by a general business plan, *in narrative form*, for the conduct of the business...." [*emphasis added*]

Since Bribiesco had little or no experience in the pre-need funeral industry, this seemed like a logical requirement.

However, the Unit later allowed Bribiesco to submit his plan *verbally*.

- Prepare monthly reports of business operations. Again, this seemed logical, given his lack of experience.

At best, however, Bribiesco submitted only one report regarding business operations. That was his April 2, 1993 letter, which described his efforts to reduce the statutory shortages.

Sometime later, the Unit gave him permission to submit his reports verbally, over the telephone.

- Develop a plan, within six months, for resolving any unfunded obligations found to exist.

According to Britson, such a plan was submitted — verbally. There is no record of that plan.

Given the loan proceeds and the Unit's belief that Bribiesco had significantly improved cash flow (by reducing the monthly mortgage payments and eliminating Gailbreath's salary), one would suspect that Bribiesco should have been able to make fairly immediate and significant progress towards reducing the shortages.

But five months into Bribiesco's appointment, the only significant progress was through his use of \$50,000 in loan proceeds. His April 2, 1993 report did not mention any progress being made through:

- His reduction of fixed costs and operating expenses.
- Continued receipt of income from previous pre-need sales (as well as income from at-need sales).

Bribiesco's own updated calculations showed the overall trusting shortage had exceeded \$150,000 before receiving the loan, much higher than his preliminary estimate of \$40,000

to \$50,000. And it was actually much higher, because those figures did not include any shortages regarding eternal rest beds and the cemetery trust.

When including those items, Clinton Memorial — 18 months into the “work out” and *after* spending the loan proceeds — still needed to come up with in the neighborhood of \$250,000 or more to resolve its shortages.

Considering the fact that Clinton Memorial during that time had been unable to buy and warehouse even just one eternal rest bed — wholesale cost of \$189 — it’s unclear why anyone would reasonably believe it could make up a deficit of \$250,000 or more.

It is unclear whether the Unit understood these points at the time, and if so, its basis for allowing the “work out” to continue — *especially without a written plan from Bribriesco detailing how the shortages would be resolved.*

Another example of the Unit’s inconsistent oversight of Bribriesco involved a dispute over whether Gailbreath was responsible for providing eternal rest beds to customers who bought them from the previous owner.

By 1993, Clinton Memorial had 100 eternal rest beds in inventory — all purchased by the previous owner. Britson wrote, “We took the position that the inventory of rest beds he [Gailbreath] purchased with Clinton Memorial were in trust for sales made by” the previous owner.

Gailbreath believed he was not responsible for the previous owner’s sales (nearly 1,000). Clearly, that logic was flawed because whoever owned Clinton Memorial was responsible for honoring all outstanding contracts, regardless of when they were initiated.

But Britson wrote, “We eventually reached a mutual agreement [with Gailbreath] that Clinton Memorial would purchase enough rest beds to equal sales made during Gailbreath’s ownership.”

It is unclear why the Unit acquiesced on this point. When Clinton Memorial was foreclosed upon the following year, the majority of eternal rest bed purchasers — *including the nearly 1,000 who preceded Gailbreath’s ownership* — were “out” by the amount of their payments.

But it appears to explain why the January 22, 1993 order required Bribriesco to determine the statutory shortage for sales made only during Gailbreath’s ownership. And it appears to at least partly explain why Bribriesco, in his April 2, 1993 report, claimed Clinton Memorial had an excess of 22 eternal rest beds when in reality it had a shortage of approximately 1,000 units.

UNCLEAR WHETHER TRUSTING DEFICIT DROPPED DURING “WORK OUT”

We believe that the Order of Supervision process resulted in more product being available for consumers than would have been the case if we had filed for a receivership earlier.

— from Britson’s April 18, 1997 letter to Ombudsman

The Ombudsman analyzed data from the Unit in trying to determine whether the trusting deficit was reduced as a result of the “work out.”

After considerable time and effort, the Ombudsman concludes the information made available to the Ombudsman is insufficient to determine whether the trusting deficit was reduced through the “work out.”

This conclusion is based on two tables the Ombudsman created based on information from the Unit. The first shows Clinton Memorial needed to trust at least \$214,720 in during the “work out.” The second shows the value of assets actually added is unclear, ranging from \$175,569 and \$252,394.

Pre-need cash receipts received and required to be trusted during “work out”

<i>TYPE OF SALE</i>	<i>Pre-need cash receipts received during “work out”²²</i>	<i>Percent to be trusted by law</i>	<i>Amount to be trusted by law</i>
<i>Chapter 523A sales</i>	\$248,821.01	80 percent	\$199,956.80
<i>Chapter 523E sales</i>	\$25,073.11	50 percent	\$12,536.55
<i>New sales, unclear whether pursuant to Chapter 523A or 523E</i>	\$27,014	unclear	\$13,507 (minimum)
<i>TOTAL</i>	\$300,908.12	NA	\$214,720.35

Value of assets actually added during “work out”

²² The first two figures in this column were calculated by using the Unit’s spreadsheet showing payments made by individual consumers from 1992 through 1994. The third figure represents new sales, listed on a separate document submitted by the Unit, which were not included on the spreadsheet document.

<i>Product</i>	<i>Number of units added</i>	<i>Value of units added</i>
<i>Eternal rest beds</i>	28	\$36,260
<i>Life insurance</i>	unknown	\$60,987
<i>Chapel vaults</i>	35.68-70.68 ²³	\$78,322.10 -- \$155,147.10
<i>TOTAL</i>	NA	\$175,569.10 -- \$252,394.10

The information in this table is based on the following points:

- Clinton Memorial added trust assets in three ways, two of which are known:
 - Eternal rest beds: \$36,260 (28 units at retail price of \$1,295).
 - Life insurance purchased April 1993: \$60,987.
- The final chapel-vault inventory would have had an approximate value of \$155,147.10, based on the following information:
 - with a retail value of \$2,195 per unit, the 37 complete chapel vaults would have had a value of \$81,215.
 - the 55 exteriors had a retail value of \$73,932.10.
- As explained previously, while Gailbreath had approximately 35 chapel vaults warehoused when the “work out” began, it’s unclear how many were assigned to Clinton Memorial and how many to Memory Gardens.

To illustrate the significance of not knowing, consider the following two examples:

- If none of those 35 units actually belonged to Clinton Memorial, that would mean the chapel-vault inventory grew by \$155,147.10 during the “work out.” Combined with the eternal rest beds and life insurance added, this would mean Clinton Memorial added \$252,394.10 in assets during the “work out” — exceeding the minimal amount that needed to be trusted.
- If all 35 chapel vaults actually belonged to Clinton Memorial, that would mean the inventory grew by only \$78,322.10. Combined with

²³ These figures are fractions because the final inventory included 37 complete chapel vaults and 55 chapel vault exteriors. The fractions were calculated as follows: 1) Since Clinton Memorial had between 0 and 35 complete chapel vaults when the “work out” began, this means it added between 2 and 37 complete units during the “work out”; 2) Britson said a complete chapel vault had a retail value of \$2,195; 3) The Ombudsman contacted the manufacturer (Fred Angermann, owner of Wisconsin Vault and Casket Company), who said a chapel vault exterior in 1994 would have had an approximate retail value of \$1,344.22; 4) Using division, an exterior was worth approximately 61.24% of a complete chapel vault; 5) Multiplying that percentage by 55 exteriors equals 33.68 complete units.

the eternal rest beds and life insurance added, this would mean Clinton Memorial added \$175,469.10 in assets during the “work out” — well under the minimal amount that needed to be trusted.

As a result, it’s impossible to determine the value of trust assets added to Clinton Memorial’s chapel-vault inventory during the “work out.”

MOST WHO MADE PAYMENTS DURING “WORK OUT” LOST MONEY

The following table shows that most consumers who made payments during the “work out” lost money:²⁴

<i>Product</i>	<i>Number of customers paying 92-94</i>	<i>Amount paid</i>	<i>Number of “victims”²⁵</i>	<i>Amount lost by “victims”</i>	<i>Number of “non-victims”²⁶</i>	<i>Amount gained by “non-victims”</i>	<i>NET CONSUMER LOSSES 92-94</i>
<i>Chapel vaults</i>	44	\$58,031.85	41	\$47,760.01	3	\$2,285.97	\$45,474.04
<i>Eternal rest beds</i>	74	\$53,795.23	68	\$50,124.38	6	\$4,746.26	\$45,378.12
<i>Other 523A items</i>	131	\$136,993.53	115	\$87,054.59	16	\$20,285.65	\$66,768.94
<i>523E items</i>	37	\$25,073.11	37	\$23,657.66	0	NA	\$23,657.66
<i>Other new contracts²⁷</i>	17	\$30,879.37	17	\$30,879.37	0	NA	\$30,879.37
<i>TOTAL</i>	303	\$309,773.09	278	\$239,476.01	25	\$27,317.88	\$212,158.13

As the table shows, the vast majority of consumers who made payments after the “work out” began lost money. Unfortunately, it appears the Unit was oblivious to this. Its responses to the Ombudsman’s investigation implied the “work out” reduced aggregate

²⁴ The figures in the top four rows of the table come from the Unit’s spreadsheet showing installment payments by individual consumers.

²⁵ “Victims” are customers whose total payments from 1992 through 1994 exceeded the total value of merchandise, trust and/or insurance funds ultimately received.

²⁶ “Non-victims” are customers whose total payments from 1992 through 1994 were less than the total value of merchandise, trust and/or insurance funds ultimately received.

²⁷ These contracts were identified in a document the Unit submitted showing new sales made after the “work out” began. These contracts were *not* contained in the spreadsheet identifying individual consumers’ installment payments after the “work out” began.

consumer losses. While some did benefit from the “work out,” many more did not benefit.

STAFFING AND RESOURCES

Britson’s responses to the Ombudsman’s investigation have generally defended the Unit’s oversight of Clinton Memorial. His initial response, dated January 27, 1995, explained several attributes of the Unit’s enforcement duties:

1. *Volume* — At the time of the Unit’s investigation, Clinton Memorial was one of approximately 400 businesses the Unit was responsible for regulating under Chapters 523A and 523E.
2. *Staffing levels* — The Unit had four to five full-time employees during the Clinton Memorial investigation. The fiscal note with the 1987 legislation for Chapter 523A indicated a need for six full-time employees *just to enforce that chapter*.²⁸

During the interview with Burnham of the Ombudsman’s office, Britson noted, “When something like Clinton Memorial breaks, you can spend a few months when we should have a staff of 10 to 15 people. But do you hire 10 to 15 people for those three months? No, you don’t.”²⁹

3. *Other duties* — During its oversight of Clinton Memorial, the Unit was also handling one to two other, large-scale cases involving violations of the pre-need chapters.

In addition, besides Chapters 523A and 523E, the Unit had primary regulatory responsibility for four to six other Code Chapters during its oversight of Clinton Memorial.³⁰

4. *Complexity* — Regulatory oversight of the preneed funeral industry is complicated and time-consuming. Each case can involve thousands of consumers and “an even larger number of contractual purchases and financial transactions,” Britson wrote. “The complexity is compounded by the fact that many preneed contracts involve a series of monthly payments over a multi-year period.”

“... In these sorts of cases, it is necessary for the [*Insurance*] Division to go through the funeral home/cemetery records, file by file (the industry standard is to have files for each individual) and create a

²⁸ The Unit has had a six-person staff since January 1996. Britson wrote that he believes the Unit has “an adequate staff at this time for our anticipated caseload.”

²⁹ The Unit did hire temporary employees on occasion during the “work out,” primarily to assist with data retrieval and data entry. Their wages were paid through the Insurance Division’s “Regulatory Fund,” funded by an assessment on each pre-need contract. The fund was also intended to help pay for costs associated with extraordinary enforcement actions, such as receiverships.

³⁰ The other chapters were: 321I; 503 (repealed in 1993); 523B; 523C; 523D; and 535C (transferred to Attorney General’s office).

computer database, in order to determine aggregate consumer sales and liabilities. Dealing with at least two large receivership-type cases of this type throughout the entire period of time in question, while also managing our normal work load under all of our statutes, has been a real challenge.”

Britson’s April 18, 1997 response added:

The small size of our staff, our limited financial resources and the number of active cases limited our ability to constantly supervise the work out at Clinton Memorial.

The Ombudsman acknowledges that regulating the pre-need funeral and cemetery industries can be complicated and time-consuming.

However, if there is a lesson to be learned from the Clinton Memorial experience, it is that the Unit should not undertake any similar “work out” efforts unless it can proactively look for warning signs. As this experience showed, a “work out” carries the risk that aggregate consumer losses can actually grow. Unless the Unit can ensure that won’t happen, it is not a risk worth taking.

And it appears Britson may agree. His April 18, 1997 response also stated:

It is our assessment, based upon our experience with the Clinton Memorial case, that work outs should only be done in situations where close supervision can be provided. As a practical matter, that means having all consumer payments going first to the [*Securities*] Bureau or an independent agent/receiver, etc. This approach is being used in a current enforcement case.

Further, if the Unit finds itself in a situation of needing to audit a particular establishment but its staff doesn’t have the time, there is another option: Arrange for a third-party audit by a certified public accountant at the expense of the establishment, pursuant to Code section 523A.2(5).

When the Ombudsman asked Britson about this option, he noted such an audit would be relatively expensive and would reduce the amount of money available to consumers. While it’s laudable to take such a position, the Clinton Memorial experience shows there are times when an audit — even an expensive one — would be easier on consumers than no audit at all.

CONCLUSION

Based on a review of the statutes concerning the Unit's regulatory responsibilities, the Ombudsman concludes the Unit did not fail to meet its statutory responsibilities in this matter.

However, the Ombudsman does conclude that the Unit was unreasonably lax in the manner and timeliness of its oversight of Clinton Memorial's efforts to correct alleged violations.

In a January 27, 1995 letter to the Ombudsman, Britson wrote:

Despite the advantage of hindsight, in discussing this with the Superintendent [of Securities] and others involved in the case, we remain absolutely convinced that our choices and decisions in the Clinton Memorial case were the best and most sound, based upon the situation's facts, our extensive experience with previous preneed and securities cases, and what the statute allowed us to do.

... The administrative order file alone shows a series of orders and agreements. Even a surface review of the order file should indicate that the [Insurance] Division was treating the situation as a serious case and was engaged in a continuous pattern of oversight.

Nevertheless, it appears Clinton Memorial's pre-need customers were adversely affected in at least two, immeasurable ways:

- Financially — This includes three groups:
 - 1) Those who had paid on contracts for openings and closings or cash advance items received no credit from the new owner.
 - 2) The majority who had to make additional payments to get what they had previously purchased.
 - 3) Those who refused to accept the new owner's credit offer and who didn't get reimbursed by insurance claims.
- Emotionally — Considering that these customers were predominantly elderly, certainly many were adversely affected by the news that their pre-need payments had not been appropriately trusted.

Further, in order to rectify the problem, they had to decide whether to accept the new owner's credit offer, or go through the process of filing an insurance claim.

The Ombudsman's review indicates that for at least some of those customers, these adverse affects may have been avoidable and unnecessary.

In the end, the Ombudsman has no concerns with the concept of the "work out." In fact, the Ombudsman would prefer to applaud the Unit for trying the new approach, with the main goal of helping Clinton Memorial's customers.

While detailing instances where the Unit missed significant warning signs, this section has not yet discussed what actions the Ombudsman believes the Unit should have taken in response to those signs. Such a discussion is relevant and perhaps necessary because there tends to be an assumption, when the Ombudsman criticizes an enforcement agency for lax enforcement, that the Ombudsman believes the agency should have used its most extreme authority at an early point in the process. And that is not the case.

Following are the two major landmarks in this case, along with the Ombudsman's explanation of how the Unit should have reasonably responded:

- Unlicensed sales: The Unit should have detected these sales and memorialized them in a letter to Clinton Memorial putting it on notice that any further unlicensed sales would result in a hearing on whether to revoke its sales permit and/or request court-imposed remedies, such as a monetary fine.

Under the entire set of circumstances, the Ombudsman would not have expected the Unit to apply to district court for a receivership, based on the unlicensed sales. However, the Ombudsman would not have criticized such a move.

- Little progress towards goals: The Unit should have relied upon this and the unlicensed sales as a basis for refusing to partially reinstate Clinton Memorial's establishment permit in the May 1, 1992 order. The Unit had a duty to expect Clinton Memorial to make significant progress and to honor the suspension order before it could earn any rewards.

Further, given the "work out" was seven months old (as of May 1, 1992) with little significant progress, that would have been an opportune time for the Unit to determine what Clinton Memorial had been doing with pre-need income either through its own audit or by arranging for a third-party audit.

Given that there was little additional progress during the rest of 1992, the Ombudsman believes the Unit had a duty, no later than December 1992, to determine what Clinton Memorial was doing with pre-need income.

Had it done so, it would have found widespread failures to trust pre-need payments — as reported in Clinton Memorial's annual report for 1992. That report, which the Unit received on March 17, 1993, triggered:

-- the December 1993 audit which found the problems were even more extensive; and

-- the Unit's February 1994 re-suspension of the establishment permit; and

-- the Unit's July 1994 notice setting a hearing on whether to revoke Clinton Memorial's establishment permit.

Under the Ombudsman's expectations, the same enforcement process that was ultimately played out would have occurred about a year earlier. As a result, there wouldn't have been a need to appoint an operations manager and there wouldn't have been a need to fully reinstate the establishment permit — a decision which in and of itself led to aggregate losses of \$49,850 for 26 customers.

The Ombudsman therefore concludes that Allegation #1 is *substantiated*.

RECOMMENDATIONS

Pursuant to Code section 2C.16(5), the Ombudsman recommends the Insurance Division:

1. Adopt and implement a policy under the principle that the Unit should do everything reasonably possible to ensure that “work outs” do not increase the number of consumer “victims.”
2. Regarding suspensions of establishment permits, devise a method to verify whether an establishment has violated the suspension or make reasonable efforts to notify consumers and potential consumers about the suspension so they are fully informed.

ALLEGATION #2

*The Insurance Division was unreasonably tardy
in notifying Clinton Memorial customers of the alleged violations.*

One person asked the primary question, which bordered on an accusation, and was asked over and over: "If you knew about this three years ago — why didn't you tell us? If we'd known then there was a problem, we wouldn't have made all these payments and wouldn't be out quite so much money. Like a fool — we went ahead and paid."

Another person, leaning on a cane, shook her finger at the officials and said, "You should have been on your toes — there's no excuse for this."

— from August 18, 1994 article in the Clinton Herald newspaper

... the only money that is listed for us in the bank is the last payment of \$72.12 that I made in July 1994. I took my payments along with my coupons to the Clinton Memorial Funeral Home, myself since July 9, 1990. I made those payments faithfully for 45 months which amounted to a total of \$3,245.50. Now they tell me there is nothing there except the last payment that Britson deposited.

My question is why weren't we told of this investigation when it first started. We could have saved a lot of money had they let us know this was happening. That makes the investigators as guilty as Gailbreath and Bribriesco. They could have stopped this fraud three years ago and didn't....

— from September 26, 1994 letter to the editor
in the Clinton Herald newspaper

FINDINGS OF FACT

The Unit's July 1991 suspension of Clinton Memorial's establishment permit was reported in both the *Clinton Herald* and *DeWitt Observer* newspapers in August 1991. Both newspapers were covering the lawsuit involving Gailbreath and Steffen; the Unit's involvement was presented as a side issue.

The articles indicated the suspension came after the Unit found violations of the state law regarding pre-need funeral contracts. They also indicated a hearing was scheduled for October 1991.

It appears there may not have been any additional media coverage about the Unit's oversight of Clinton Memorial until June 20, 1994. That's when the *Clinton Herald* reported the Unit was investigating Clinton Memorial for possible violations of the pre-need statutes.

That article did not report that the Unit had suspended Clinton Memorial's establishment permit earlier that year. It's unclear what triggered the article or how the newspaper became aware of the Unit's investigation.

ANALYSIS AND CONCLUSIONS

Part of the reason that our actions in this case were in the form of Orders was to create publicly-available documents. The Division's actions ... were a matter of public record. Local newspapers had covered our early administrative actions and we believe that the situation was publicly known.

— Britson in April 18, 1997 letter of response to Ombudsman

The Unit's initial order in this matter, dated July 3, 1991, was reported on in two newspapers. At least one of the newspapers reported that it had obtained the Unit's order.

Both articles indicated the investigation was continuing and there was another hearing scheduled.

After that, it appears there was no additional media coverage for nearly three years. It's unclear why there weren't any follow-up articles during that period. But that's not something the Unit had any control over.

Nothing in state law or administrative rule would have required the Unit to communicate with Clinton Memorial's customers during that period. As a result, the decision of whether to issue any such communications is a discretionary one.

Given this, some might wonder why the Unit addressed its August 1, 1994 letter to Clinton Memorial's customers. That letter, Britson explained, was sent in the context of the Unit's application for a court-ordered receivership.

He also explained that had the Unit sent a "mass mailing" to consumers earlier in the process, it may have actually harmed consumers more than helping them. The main reason for this was that the majority of Clinton Memorial's pre-need customers had "irrevocable" contracts. Under such a contract, if the customer misses just one installment payment, the seller (Clinton Memorial) can cancel the contract without returning the customer's previous payments.

Tamera Watson, the Unit's investigator, explained the significance of this during the interview with Burnham of the Ombudsman's office:

If some of these people had seen an article and thought 'Uh oh, there's a problem' and had not paid, and it had worked out, the funeral home could have said they defaulted on their contract and then they'd have lost it all because they were in an irrevocable contract

Britson elaborated on the point later in the same interview:

... it is difficult because first of all we can't give legal advice. So if we send out a blast that says, 'OK, we have taken these actions against the funeral home,' they're going to call us and [ask] 'What about this' and we're going to say, 'All we can tell you is what we have done and why we've done it. As to whether or not you continue to make payments or not, we can't advise you on that.

And in his April 18, 1997 letter of response, Britson wrote:

The Division's normal practice is to issue press releases when we believe the public needs to know something about an enforcement case. However, the Division is not authorized to provide legal advice. Absent advice telling consumers what they should do in such a situation, such notices are likely to be of limited use....

Unfortunately, notice of such problems is of limited benefit to consumers who have irrevocable contracts....

Given the media coverage in 1991, and given the Unit's inability to advise customers on whether to continue making payments, the Ombudsman cannot conclude the Unit was unreasonably tardy in notifying Clinton Memorial customers of the alleged violations.

The Ombudsman therefore concludes that Allegation #2 is *unsubstantiated*.

Appendix A

CHAPTER 523A FUNERAL SERVICES AND MERCHANDISE

- 523A.1 Trust fund established—insurance.
- 523A.2 Deposit of funds—records—examinations—reports.
- 523A.3 Disbursement of remaining funds in nonguaranteed irrevocable burial trust fund.
- 523A.4 Repealed by 82 Acts, ch 1249, §2.
- 523A.5 Scope of chapter—definitions.
- 523A.6 Compliance with other laws.
- 523A.7 Bond in lieu of trust fund.
- 523A.8 Disclosures.
- 523A.9 Establishment permits.
- 523A.10 Sales permits.
- 523A.11 Investigations.
- 523A.12 Suspension or revocation of permits.
- 523A.13 Prosecution for violations of law.
- 523A.14 Injunctions.
- 523A.15 Fraudulent practices.
- 523A.16 Rules.
- 523A.17 Cease and desist orders.
- 523A.18 Violations and penalties.
- 523A.19 Receiverships.
- 523A.20 Insurance division's regulatory fund.
- 523A.21 License revocation—recommendation by commissioner to board of mortuary science examiners.
- 523A.22 Liquidation.
- 523A.23 Minimum fidelity bond or insurance policy. Repealed by 96 Acts, ch 1160, §20.

523A.1 Trust fund established—insurance.

1. Whenever an agreement is made by any person, firm, or corporation to furnish, upon the future death of a person named or implied in the agreement, funeral services or funeral merchandise, a minimum of eighty percent of all payments made under the agreement shall be and remain trust funds until occurrence of the death of the person for whose benefit the funds were paid, unless the funds are sooner released to the person making the payment by mutual consent of the parties. Payments otherwise subject to this section are not exempt merely because they are held in certificates of deposit. The commissioner may adopt rules to prohibit the commingling of trust funds with other funds of the seller.

Interest or income earned on amounts deposited in trust under this section shall remain in trust under the same terms and conditions as the payments made under the agreement, except that the seller may withdraw so much of the interest or income as represents the difference between the amount needed to adjust the trust funds for inflation as set by the commissioner based on the consumer price index and the interest or income earned during the preceding year not to exceed

fifty percent of the total interest or income, on a calendar year basis. The early withdrawal of interest or income pursuant to this provision does not affect the purchaser's right to the full refund or credit of such interest or income in the event the payments and interest in trust are released to the purchaser or in the event of a nonguaranteed price agreement, respectively. This provision does not affect the purchaser's right to a total refund of principal and interest or income in the event of nonperformance.

If an agreement pursuant to this section is to be paid in installment payments, the seller shall deposit eighty percent of each payment in trust until the full amount to be trusted has been deposited. If the agreement is financed with or sold to a financial institution, then the agreement shall be considered paid in full and the deposit requirements of this section shall be satisfied within fifteen days after the close of the month of receipt of the funds from the financial institution.

This section does not apply to payments for merchandise delivered to the purchaser. Delivery includes storage in a warehouse or storage facility approved by the commissioner. Concrete burial vaults and caskets sold after July 1, 1995, shall not be delivered in lieu of trusting. The commissioner may prohibit delivery in lieu of trusting with regard to additional types of inner burial containers and merchandise or establish standards for the approval of storage facilities, pursuant to rules adopted for that purpose.

2. An agreement may be funded by insurance proceeds derived from a policy issued by an insurance company authorized to conduct business in this state. Such funding may be in lieu of a trust fund if the payments are made directly to the insurance company by the purchaser of the agreement.

[C54, 58, 62, 66, 71, 73, 75, 77, 79, 81, § 523A.1]

87 Acts, ch 30, §3; 90 Acts, ch 1213, § 1; 95 Acts, ch 149, § 1, 2; 98 Acts, ch 1189, §7

Subsection 1, unnumbered paragraph 4 amended

523A.2 Deposit of funds—records—examinations—reports.

1. *a.* All funds held in trust under section 523A.1 shall be deposited in a state or federally insured bank, savings and loan association, or credit union authorized to conduct business in this state, or trust department of such bank, savings and loan association, or credit union, or in a trust company authorized to conduct business in this state, within fifteen days after the close of the month of receipt of the funds and shall be held as provided in paragraph "g" for the designated beneficiary until released pursuant to section 523A.1.

b. The seller under an agreement referred to in section 523A.1 shall maintain accurate records of all receipts, expenditures, interest or earnings, and disbursements relating to funds held in trust, and shall make these records available to the commissioner for examination at any reasonable time upon request.

c. The seller under an agreement referred to in section 523A.1 shall file with the commissioner not later than March 1 of each year a report including the following information:

(1) The name and address of the seller and the name and address of the establishment that will provide the funeral services or funeral merchandise.

(2) The balance of each trust account as of the end of the preceding calendar year, identified by the name of the purchaser or the beneficiary, and a report of any amounts withdrawn from trust and the reason for each withdrawal.

(3) A description of insurance funding outstanding at the end of the preceding calendar year,

identified by the name of the purchaser or the beneficiary, and a report of any insurance payments received by the seller.

(4) A complete inventory of funeral merchandise delivered in lieu of trusting pursuant to section 523A.1, including the location of the merchandise, serial numbers or warehouse receipt numbers, identified by the name of the purchaser or the beneficiary, and a verified statement of a certified public accountant that the certified public accountant has conducted a physical inventory of the funeral merchandise and that each item of that merchandise is in the seller's possession at the specified location. The statement shall be on a form prescribed by the commissioner.

(5) The name of the purchaser, beneficiary, and the amount of each agreement referred to in section 523A.1 made in the preceding year and the date on which it was made.

(6) Other information reasonably required by the commissioner for purposes of administration of this chapter.

The report shall be accompanied by a filing fee determined by the commissioner which shall be sufficient to defray the costs of administering this chapter.

The commissioner, by rule, may waive receipt of any or all of the information listed in this lettered paragraph and adopt a shorter form of annual report. The shorter form may be used for all establishments or for establishments meeting specified criteria. If the commissioner does adopt a shorter form of annual report, the commissioner shall retain the authority to require all of the information listed above for audit purposes or otherwise. The commissioner may accept annual reports submitted in an electronic format, such as computer diskettes.

d. A financial institution referred to in paragraph "a" shall file notice with the commissioner of all funds deposited under the trust agreement. The notice shall be on forms prescribed by the commissioner and shall be filed not later than March 1 of each year. Each notice shall contain the required information for all deposits made during the previous calendar year. Forms may be obtained from the commissioner. The commissioner may accept notices submitted in an electronic format, such as computer diskettes.

e. Notwithstanding chapter 22, all records maintained by the commissioner under this subsection shall be confidential and shall not be made available for inspection or copying except upon approval of the commissioner or the attorney general.

f. The financial institution in which trust funds are held shall not be owned or under the control of the seller and shall not use any funds required to be held in trust pursuant to this chapter or chapter 566A to purchase an interest in any contract or agreement to which the seller is a party, or otherwise to invest, directly or indirectly, in the seller's business operations.

g. All funds required to be deposited for a purpose described in section 523A.1 shall be deposited in a manner consistent with one of the following:

(1) The payments will be deposited directly by the purchaser in an irrevocable interest-bearing burial account in the name of the purchaser.

(2) The payments will be deposited directly by the purchaser in a separate account in the name of the purchaser. The account may be made payable to the seller on the death of the purchaser or the designated beneficiary, provided that, until death, the purchaser retains the exclusive power to hold, manage, pledge, and invest the funds in the account and may revoke the trust and withdraw the funds, in whole or in part, at any time.

(3) The payments will be deposited by the purchaser or the seller in a separate burial trust account in the name of the purchaser, as trustee, in trust for the named beneficiary, to be held,

invested, and administered as a trust account for the benefit and protection of the person for whose benefit the funds were paid. The depositor shall notify the financial institution of the existence and terms of the trust, including at a minimum the name of each party to the agreement, the name and address of the trustee, and the name and address of the beneficiary. The account may be made payable to the seller upon the death of the designated beneficiary.

(4) The payments will be deposited in the name of the trustee, as trustee, under the terms of a master trust agreement and the trustee may invest, reinvest, exchange, retain, sell, and otherwise manage the trust fund for the benefit and protection of the person for whose benefit the funds were paid.

In addition to the methods provided for above, the commissioner may by rule authorize other methods of deposit upon a finding that the other method provides equivalent safety of the principal and interest or income and the seller does not have the ability to utilize any of the proceeds prior to performance. Moneys deposited under the master trust agreement may be commingled for investment purposes as long as each deposit includes a detailed listing of the amount deposited in trust for each beneficiary and a separate accounting of each purchaser's principal, interest, and income is maintained. Subject to the master trust agreement, the seller may appoint an independent investment advisor to act in an advisory capacity with the trustee relative to the investment of the trust funds. The trust shall pay the cost of the operation of the trust and any annual audit fees.

The financial institution, or the trust department of the financial institution in which trust funds are held, may serve as trustee to the extent the institution or department has been granted those powers under the laws of this state or the United States. The seller or any officer, director, agent, employee, or affiliate of the seller shall not serve as trustee.

2. In addition to complying with subsection 1, each seller under an agreement referred to in section 523A.1 shall file annually with the commissioner an authorization for the commissioner or a designee to investigate, audit, and verify all funds, accounts, safe-deposit boxes, and other evidence of trust funds held by or in a financial institution.

3. The commissioner shall adopt rules under chapter 17A specifying the form, content, and cost of the forms for the notices and disclosures required by this section, and shall sell blank forms at that cost to any person on request.

4. If a seller under an agreement referred to in section 523A.1 ceases to do business, whether voluntarily or involuntarily, and the obligation to provide the merchandise and services has not been assumed by another funeral home or cemetery holding an establishment permit issued under this chapter, all funds held in trust under section 523A.1, including accrued interest or earnings, shall be repaid to the purchaser under the agreement.

5. The commissioner may require the performance of an audit of the seller's business by a certified public accountant if the commissioner receives reasonable evidence that the seller is not complying with this chapter. The audit shall be paid for by the seller, and a copy of the report of audit shall be delivered to the commissioner and to the seller.

6. A seller or financial institution that knowingly fails to comply with any requirement of this section or that knowingly submits false information in a document or notice required by this section commits a serious misdemeanor.

7. This chapter does not prohibit the funding of an agreement by insurance proceeds derived from a policy issued by an insurance company authorized to conduct business in this state. The seller of an agreement subject to this chapter which is to be funded by insurance proceeds shall

obtain all permits required to be obtained under this chapter and comply with the reporting requirements of this section.

[C54, 58, 62, 66, 71, 73, 75, 77, 79, 81, § 523A.2, 523A.4; 82 Acts, ch 1249, § 1]

85 Acts, ch 159, §3; 87 Acts, ch 30, §4; 89 Acts, ch 257, § 1; 90 Acts, ch 1213, § 2, 3; 95 Acts, ch 149, §3, 4; 96 Acts, ch 1160, § 1, 2; 97 Acts, ch 23, §62

523A.3 Disbursement of remaining funds in nonguaranteed irrevocable burial trust fund.

1. As used in this section:

- a. *"Burial trust fund"* means a nonguaranteed irrevocable burial trust fund.
- b. *"Director"* means the director of human services.
- c. *"Next of kin"* means the surviving spouse and heirs at law of the deceased.
- d. *"Personal representative"* means personal representative as defined in section 633.3.

2. If funds remain in a nonguaranteed irrevocable burial trust fund after all payments are made in accordance with the conditions and terms of the agreement for funeral merchandise or funeral services, the seller shall comply with all of the following:

a. The seller shall provide written notice by mail to the director in accordance with subsection 3.

b. Following a period of at least sixty days after the mailing of the notice to the director, the seller shall disburse any remaining funds from the burial trust fund as follows:

(1) If within the sixty-day period the seller receives a claim from the personal representative of the deceased, any remaining funds shall be disbursed to the personal representative, notwithstanding any claim by the director.

(2) If within the sixty-day period the seller has not received a claim from the personal representative of the deceased but receives a claim from the director, the seller shall disburse the remaining funds up to the amount of the claim to the director.

(3) Any remaining funds not disposed of pursuant to subparagraphs (1) and (2) shall be disbursed to any person who is identified as the next of kin of the deceased in an affidavit submitted in accordance with subsection 6.

3. The notice mailed to the director shall meet all of the following requirements and is subject to all of the following conditions:

a. The notice shall be mailed with postage prepaid.

b. If the notice is sent by regular mail, the sixty-day period for receipt of a response is deemed to commence three days following the date of mailing.

c. If the notice is sent by certified mail, the sixty-day period for receipt of a response is deemed to commence on the date of mailing.

d. The notice shall provide all of the following information:

(1) The current name, address, and telephone number of the seller.

(2) The full name of the deceased.

(3) The date of the deceased's death.

(4) The amount of the funds remaining in the burial trust fund.

(5) A statement that any claim by the director shall be received by the seller within sixty days of the date of mailing of the notice.

e. A notice in substantially the following form complies with this subsection:

"To: The Director of Human Services

From: (Seller's Name, Current Address, and Telephone Number)

You are hereby notified that (name of deceased), who had an irrevocable burial trust fund, has died, that final payment for funeral merchandise and funeral services has been made, and that (remaining amount) remains in the irrevocable burial trust fund.

The above-named seller must receive a written response regarding any claim by the director within sixty days of the mailing of this notice to the director.

If the above-named seller does not receive a written response regarding a claim by the director within sixty days of the mailing of this notice, the seller may dispose of the remaining funds in accordance with section 523A.3, Code of Iowa."

4. Upon receipt of the seller's written notice, the director shall determine if a debt is due the department of human services pursuant to section 249A.5. If the director determines that a debt is owing, the director shall provide a written response to the seller within sixty days of the mailing of the seller's notice. If the director does not respond with a claim within the sixty-day period, any claim made by the director shall not be enforceable against the seller, the trust, or a trustee.

5. A personal representative who wishes to make a claim shall send written notice of the claim to the seller. If the seller does not receive any claim from a personal representative within the sixty-day period provided for response by the director regarding a claim, the claim of the personal representative shall not be enforceable against the seller, the trust, or a trustee.

6. Any person other than a personal representative or the director claiming an interest in the remaining funds shall submit all of the following in an affidavit claiming an interest:

- a. The full name, current address, and telephone number of the claimant.
- b. The claimant's relationship to the deceased.
- c. The name of any surviving next of kin of the deceased, and the relationship of any named surviving next of kin.
- d. That the claimant has no knowledge of the existence of a personal representative for the deceased's estate.

7. The seller may retain not more than fifty dollars of the remaining funds in the burial trust fund for the administrative expenses associated with the requirements of this section.

8. If the funds remaining in a burial trust fund are disbursed in accordance with the requirements of this section, the seller, the burial trust fund, and any trustee shall not be liable to the director, the estate of the deceased, any personal representative, or any other interested person for the remaining funds and any lien imposed by the director shall be unenforceable against the seller, the burial trust fund, or any trustee.

96 Acts, ch 1093, §2

523A.4 Repealed by 82 Acts, ch 1249, § 2. See § 523A.2(6).

523A.5 Scope of chapter—definitions.

1. This chapter applies only to the sale of funeral services, funeral merchandise, or a combination of these.

2. As used in this chapter:

- a. "*Funeral services*" means one or more services to be provided at the time of the final

disposition of a dead human body, including but not limited to services necessarily or customarily provided in connection with a funeral, or services necessarily or customarily provided in connection with the interment, entombment, or cremation of a dead human body, or a combination of these. "Funeral services" does not include perpetual care or maintenance.

b. "*Funeral merchandise*" means one or more types of personal property to be used at the time of the final disposition of a dead human body, including but not limited to clothing, caskets, vaults, and interment receptacles. "Funeral merchandise" does not include real property, and does not include grave markers, tombstones, ornamental merchandise, and monuments.

c. "*Commissioner*" means the commissioner of insurance or the deputy appointed under section 502.601.

d. "*Inner burial container*" means a container in which human remains are placed for burial or entombment and, if only one container is used for purposes of burial or entombment, includes a container designed to serve the same function as merchandise commonly known as burial vaults, urn vaults, grave boxes, grave liners, and lawn crypts.

[82 Acts, ch 1249, § 2]

87 Acts, ch 30, §5, 6; 98 Acts, ch 1189, §8

Subsection 2, NEW paragraph d

523A.6 Compliance with other laws.

The seller of funeral services or funeral merchandise shall comply with chapter 555A with respect to all contracts that are subject to regulation under this chapter. A failure to comply is subject to the remedies and penalties provided in that chapter.

[82 Acts, ch 1249, § 3]

523A.7 Bond in lieu of trust fund.

1. In lieu of the trust fund required by sections 523A.1 and 523A.2, a seller may file with the commissioner a surety bond that is issued by a surety company authorized to do business in this state and that is conditioned on the faithful performance by the seller of agreements subject to this chapter. The liability of the surety extends to each agreement that is subject to this chapter and that is executed during the time the bond is in force and until performance of the agreement or rescission of the agreement by mutual consent of the parties; and, to the extent expressly agreed to in writing by the surety company under subsection 3, paragraph "b", the liability of the surety extends to each agreement that is subject to this chapter and that was executed prior to the time the bond was in force and until performance of the agreement or rescission of the agreement by mutual consent of the parties. A buyer who is aggrieved by a breach of a condition of the bond covering the contract of that buyer may maintain an action against the bond, provided that if, at the time of the breach, the buyer is aware of the buyer's rights under the bond and how to file a claim against the bond, the surety shall not be liable as a result of any breach of condition unless notice of a claim is received by the surety within sixty days following the discovery of the acts, omissions, or conditions constituting the breach of condition, except as otherwise provided in subsection 2. A surety bond submitted under this subsection shall not be canceled by a surety company except upon a written notice of cancellation given by the surety company to the commissioner by restricted certified mail, and the surety bond shall not be canceled prior to the expiration of sixty days after the receipt by the commissioner of the notice of cancellation.

2. If a seller becomes insolvent or otherwise ceases to engage in business prior to or within

sixty days after the cancellation of a bond submitted under subsection 1, the seller shall be deemed to have breached the conditions of the surety bond with respect to all outstanding contracts subject to this chapter as of the day prior to cancellation of the bond. The commissioner shall mail written notice by restricted certified mail to the buyer under each outstanding contract of the seller that a claim against the bond must be filed with the surety company within sixty days after the date of mailing of the notice. The surety company shall cease to be liable with respect to all agreements except those for which claims are filed with the surety company within sixty days after the date the notices are mailed by the commissioner.

3. If a surety bond is canceled by a surety company under any conditions other than those specified in subsection 2, the seller shall comply with paragraphs "a" and "b":

a. The seller shall comply with the trust requirements of sections 523A.1 and 523A.2 with respect to all contracts subject to this chapter that are executed on or after the effective date of cancellation of the surety bond, or the seller may submit a substitute surety bond meeting the requirements of subsection 1, but the seller must comply with sections 523A.1 and 523A.2 with respect to any contracts executed on or after the effective date of cancellation of the earlier surety bond and prior to the date on which the later surety bond takes effect.

b. Within sixty days after the effective date of the cancellation of the surety bond, the seller shall submit to the commissioner an undertaking by another surety company that a substitute surety bond meeting the requirements of subsection 1 is in effect and that the liability of the substitute surety bond extends to all outstanding contracts of the seller that were executed but not performed or extinguished prior to the effective date of the substitute surety bond, or the seller shall submit to the commissioner a financial statement accompanied by an unqualified opinion based upon an audit performed by a certified public accountant licensed in this state certifying the total amount of outstanding liabilities of the seller on contracts subject to this chapter and proof of deposit by the seller in trust under sections 523A.1 and 523A.2 of either the amount specified in section 523A.1, including interest as set by the commissioner based on the interest which would have been earned had the funds been maintained in trust, with respect to all of those outstanding contracts or, where applicable, that delivery of merchandise has been made in compliance with section 523A.1. The surety may require such security as is necessary to comply with this section. Upon compliance by the seller with this paragraph, the surety company canceling the surety bond shall cease to be liable with respect to any outstanding contracts of the seller except those with respect to which a breach of condition occurred prior to cancellation and timely claims were filed.

4. Section 523A.2, subsection 1, paragraphs "b", "c", and "e", subsection 5, and, to the extent it is applicable, subsection 6, apply to sellers whose agreements are covered by a surety bond maintained under this section, and section 523A.2 continues to apply to any agreements of those sellers that are not covered by a surety bond maintained under this section.

5. Upon receiving a notice of cancellation of a surety bond, the commissioner shall notify the seller of the requirements of this chapter resulting from cancellation of the bond. The notice may be in the form of a copy of this section and sections 523A.1 and 523A.2.

6. Upon receiving a notice of cancellation, unless the seller has complied with the requirements of this section, the attorney general shall seek an injunction to prohibit the seller from making further agreements subject to this chapter and shall commence an action to attach and levy execution upon property of the seller when the seller fails to perform an agreement subject to this chapter, to the extent necessary to secure compliance with this chapter, and the

county attorney may bring criminal charges under section 523A.2, subsection 6.

7. The surety under this section shall not be owned or under the control of the seller.

[82 Acts, ch 1249, § 4]

87 Acts, ch 30, §7

523A.8 Disclosures.

1. Every agreement for funeral merchandise or funeral services under this chapter shall be written in clear, understandable language and shall be printed or typed in easy-to-read type, size, and style, and shall:

a. Identify the seller, the salesperson's permit and establishment name and permit number, the expiration date of the salesperson's permit, the purchaser, and the person for whom the funeral services or funeral merchandise are purchased if other than the purchaser.

b. Specify the funeral services or funeral merchandise, or both, to be provided, and the cost of each service and merchandise item.

c. State clearly the conditions on which substitution will be allowed.

d. Set forth the total purchase price and the terms under which it is to be paid.

e. State clearly whether the agreement is a guaranteed price contract or a nonguaranteed price contract. Each nonguaranteed price contract shall contain in twelve point bold type, an explanation of the consequences in substantially the following language:

THE PRICES OF MERCHANDISE AND SERVICES UNDER THIS AGREEMENT ARE SUBJECT TO CHANGE IN THE FUTURE. ANY FUNDS PAID UNDER THIS CONTRACT ARE ONLY A DEPOSIT TO BE APPLIED, TOGETHER WITH ACCRUED INCOME, TOWARD THE FINAL COSTS OF THE MERCHANDISE OR SERVICES CONTRACTED FOR. ADDITIONAL CHARGES MAY BE REQUIRED.

f. State clearly whether the agreement is a revocable or irrevocable contract, and who has the authority to revoke the contract.

g. State the amount or percentage of money to be placed in trust.

h. Explain the disposition of the income generated from investments, include a statement of fees, expenses, and taxes which may be deducted, and include a statement of the buyer's responsibility for income taxes owed on the income, if applicable.

i. Specify the purchaser's right to cancel and damages for cancellation, if any.

j. Include an explanation of regulatory oversight by the insurance division in twelve point bold type, in substantially the following language:

THIS CONTRACT IS SUBJECT TO RULES ADMINISTERED BY THE IOWA INSURANCE DIVISION. YOU MAY CALL THE INSURANCE DIVISION AT (INSERT TELEPHONE NUMBER). WRITTEN INQUIRIES OR COMPLAINTS SHOULD BE MAILED TO THE FOLLOWING ADDRESS: (INSERT ADDRESS).

k. State that if, after all payments are made in accordance with the conditions and terms of the agreement for funeral merchandise or funeral services, any funds remain in the nonguaranteed irrevocable burial trust fund, the seller shall disburse the remaining funds to a personal representative of the deceased as defined in section 633.3, or to the deceased's surviving next of

kin, or to the director of human services, in accordance with section 523A.3.

2. The commissioner may adopt rules establishing disclosure and format requirements to promote consumers' understanding of the merchandise and services purchased and the available funding mechanisms under an agreement pursuant to this chapter.

3. Every agreement shall be signed by the purchaser, the seller, and if the agreement is for funeral services as defined in chapter 156, a person licensed to deliver those services.

4. The seller shall disclose at the time an application is made by an individual and prior to accepting the applicant's initial premium or deposit for a preneed funeral contract or prearrangement subject to section 523A.1 which is funded by a life insurance policy, the following information:

a. That a life insurance policy is involved or being used to fund an agreement.

b. The nature of the relationship among the soliciting agent or agents, the provider of the funeral or cemetery merchandise or services, the administrator, and any other person.

c. The relationship of the life insurance policy to the funding of the prearrangement and the nature and existence of any guarantees relating to the prearrangement.

d. The impact on the prearrangement of the following:

(1) Changes in the life insurance policy including, but not limited to, changes in the assignment, beneficiary designation, or use of proceeds.

(2) Any penalties to be incurred by the policyholder as a result of the failure to make premium payments.

(3) Penalties to be incurred or cash to be received as a result of the cancellation or surrender of the life insurance policy.

e. A list of merchandise and services which are applied or contracted for in the prearrangement and all relevant information concerning the price of the funeral services, including an indication that the purchase price is either guaranteed at the time of purchase or to be determined at the time of need.

f. All relevant information concerning what occurs and whether any entitlements or obligations arise if there is a difference between the proceeds of the life insurance policy and the amount actually needed to fund the agreement.

g. Any penalties or restrictions, including but not limited to, geographic restrictions or the inability of the provider to perform, on the delivery of merchandise, services, or the prearrangement guarantee.

h. That a sales commission or other form of compensation is being paid and, if so, the identity of the individuals or entities to whom it is paid.

87 Acts, ch 30, §8; 95 Acts, ch 68, §4; 95 Acts, ch 149, §5-7; 96 Acts, ch 1093, § 1; 98 Acts, ch 1189, §9

Subsection 1, paragraph j amended

523A.9 Establishment permits.

1. A person, as defined in section 4.1, subsection 20, shall not engage in the business of selling, promoting, or otherwise entering into agreements to furnish, upon the future death of a person named or implied in the agreement, funeral services, property for use in funeral services, or funeral merchandise without an establishment permit as provided for in this section. An establishment doing business shall obtain a permit for each location.

2. An applicant for a permit under this section shall submit to the commissioner an application

on a form provided by the commissioner. The application shall include at a minimum the following information:

- a. The name and location of the applicant's business.
- b. The name and location of the provider who will provide the funeral services or funeral merchandise.
- c. The name and address of each owner, officer, or other official of the applicant's business, or in the event that the applicant is a corporation, the names and addresses of the chief executive officer and the members of the board of directors.
- d. The types of professional services or funeral merchandise to be sold.

An application for a permit pursuant to this section shall be accompanied by a copy of each sales agreement the permit holder will use for sales of funeral services or funeral merchandise under section 523A.1.

A permit holder shall inform the commissioner of changes in the information within thirty days of the change.

3. The applicant for a permit shall submit a fee in the amount of fifty dollars.
4. Permits granted under this section are not assignable.
5. Upon the filing of an application for a permit, the commissioner shall issue the permit, unless the commissioner finds that any of the following apply:
 - a. The applicant is insolvent.
 - b. The applicant has failed to comply with any terms or conditions of this chapter and such failure is deemed by the commissioner to substantially impede the applicant's ability to abide by the provisions of this chapter.
 - c. The applicant has been convicted of a criminal offense involving dishonesty or false statement.
 - d. The applicant cannot provide the funeral services or funeral merchandise the applicant purports to sell.
6. If the commissioner does not grant the permit, the commissioner shall notify the applicant in writing of the denial and the reasons for the denial. The commissioner shall approve or deny every application for a license within ninety days after the filing thereof, but any failure of the commissioner to act within that time period shall not be deemed to be an approval of the application.

87 Acts, ch 30, §9; 90 Acts, ch 1213, § 4

523A.10 Sales permits.

1. An individual shall not sell, promote, or otherwise enter into an agreement to furnish, upon the future death of a person named or implied in the agreement, funeral services or funeral merchandise without a permit as provided for in this section. An individual permit holder must be an employee or agent of an establishment which holds a permit pursuant to section 523A.9 and which can deliver the funeral services or funeral merchandise being sold. The establishment is liable for the acts of its employees and agents, independent or otherwise, performed in the course of obtaining or attempting to obtain an agreement for the sale of funeral services or funeral merchandise under section 523A.1.

2. This chapter does not allow a person to engage in the practice of mortuary science without a license. However, a person having a valid permit under this section may engage in the preneed sale of a funeral director's services as an employee or agent of a funeral establishment that may

furnish the funeral services in accordance with chapter 156.

3. An applicant for a permit under this section shall submit to the commissioner an application on a form provided by the commissioner. The application shall include at a minimum the following information:

- a. The name and address of the applicant.
- b. The name and address of the applicant's employer or the establishment on whose behalf the applicant will be making or attempting to make sales, and, if different, the name and address of the provider who will provide the funeral services or funeral merchandise.

A permit holder shall inform the commissioner of changes in the information within thirty days of the change.

4. The permit shall be deemed effective upon filing the application with the commissioner. The permit shall disclose on its face the permit holder's employer or the establishment on whose behalf the applicant will be making or attempting to make sales, the permit number, and the expiration date. An initial permit under this section shall expire one year from the date the application is filed. The permit may be renewed for a period of four years.

5. The initial application fee shall be five dollars. The renewal fee shall be twenty dollars.

6. Permits granted under this section are not assignable.

7. The commissioner may revoke a permit if the commissioner determines that the permit holder has been convicted of a criminal offense involving dishonesty or false statement or that the establishment cannot provide the funeral services or funeral merchandise the establishment purports to sell.

87 Acts, ch 30, §10; 96 Acts, ch 1160, § 3

523A.11 Investigations.

The attorney general or the commissioner may, for the purpose of discovering violations of this chapter or any rules adopted under this chapter:

1. Investigate the business and examine the books, accounts, records, and files used by every permit holder under this chapter.

2. Notwithstanding chapter 22, keep confidential the information obtained in the course of an investigation. However, if the commissioner determines that it is necessary or appropriate in the public interest or for the protection of the public, the commissioner may share information with other regulatory authorities or governmental agencies, or may publish information concerning a violation of this chapter or a rule or order under this chapter.

3. Administer oaths and affirmations, subpoena witnesses, receive evidence, and require the production of documents and records in connection with an investigation or proceeding being conducted pursuant to this chapter.

4. Apply to the district court for issuance of an order requiring a person's appearance before the commissioner or attorney general, or a designee of either or both, in cases where the person has refused to obey a subpoena issued by the commissioner or attorney general. The person may also be required to produce documentary evidence germane to the subject of the investigation. Failure to obey a court order under this subsection constitutes contempt of court.

87 Acts, ch 30, §11; 96 Acts, ch 1160, § 4

523A.12 Suspension or revocation of permits.

1. The commissioner may, pursuant to chapter 17A, suspend or revoke any permit issued

pursuant to this chapter if the commissioner finds any of the following:

a. The permit holder has committed a fraudulent act, engaged in a fraudulent practice, or violated any provisions of this chapter or any rule adopted under this chapter or any other state or federal law applicable to the conduct of the permit holder's business.

b. Any fact or condition exists which, if it had existed at the time of the original application for the permit, would have warranted the commissioner refusing originally to issue the permit.

c. The permit holder is found upon investigation to be insolvent, in which case the permit shall be revoked immediately.

d. The permit holder, for the purpose of avoiding the trusting requirement for funeral services under section 523A.1, attributes amounts paid pursuant to the agreement to funeral merchandise that is delivered under section 523A.1 rather than to funeral services sold to the purchaser. The sale of funeral services at a lower price when the sale is made in conjunction with the sale of funeral merchandise to be delivered pursuant to section 523A.1 than the services are regularly and customarily sold for when not sold in conjunction with funeral merchandise is evidence that the permit holder is acting with the purpose of avoiding the trusting requirement for funeral services under section 523A.1.

e. The permit holder is found upon investigation to have engaged in a deceptive act or practice or has deliberately misrepresented or omitted a material fact relative to the sale of funeral services or funeral merchandise under this chapter.

f. The permit holder is found to have sold the establishment and has not filed notice of the sale with the commissioner prior to the sale. The permit shall be revoked thirty days following such sale.

2. The commissioner may, on good cause shown, suspend any permit for a period not exceeding thirty days, pending investigation.

Except as provided in the preceding paragraph, a permit shall not be revoked or suspended except after notice and hearing in accordance with chapter 17A.

3. Any permit holder may surrender a permit by delivering to the commissioner written notice that the permit holder surrenders the permit, but the surrender shall not affect the permit holder's civil or criminal liability for acts committed before the surrender.

4. Revocation, suspension, or surrender of a permit does not impair or affect the obligation of any preexisting lawful contract between the permit holder and any person.

87 Acts, ch 30, §12; 90 Acts, ch 1213, § 5, 6; 96 Acts, ch 1160, § 5

523A.13 Prosecution for violations of law.

If the commissioner believes that grounds exist for the criminal prosecution of persons subject to this chapter for violations of this chapter or any other law of this state, the commissioner may forward to the attorney general or the county attorney the grounds for the belief, including all evidence in the commissioner's possession, in order that the attorney general or the county attorney may proceed with the matter as deemed appropriate. At the request of the attorney general, the county attorney shall appear and prosecute the action when brought in the county attorney's county.

87 Acts, ch 30, §13; 90 Acts, ch 1213, § 7

523A.14 Injunctions.

The attorney general or the commissioner may apply to the district court in any county of the

state for an injunction to restrain a person subject to this chapter and any agents, employees, or associates of the person from engaging in conduct or practices deemed contrary to the public interest. In any proceeding for an injunction, the attorney general or the commissioner may apply to the court for the issuance of a subpoena to require the appearance of a defendant and the defendant's agents and any documents, books, and records germane to the hearing upon the petition for an injunction. Upon proof of any of the offenses described in the petition for injunction the court may grant the injunction. The attorney general or the commissioner shall not be required to post a bond.

87 Acts, ch 30, §14; 96 Acts, ch 1160, § 6; 98 Acts, ch 1189, §10

Section amended

523A.15 Fraudulent practices.

A person who commits any of the following acts commits a fraudulent practice and is punishable as provided in chapter 714:

1. Knowingly fails to comply with any requirement of this chapter.
2. Knowingly makes, causes to be made, or subscribes to a false statement or representation in a report or other document required under this chapter, or renders such a report or document misleading through the deliberate omission of information properly belonging in the report or document.
3. Conspires to defraud in connection with the sale of funeral services or funeral merchandise under this chapter.
4. Fails to deposit funds in compliance with section 523A.1 or withdraws any funds in a manner inconsistent with this chapter.
5. Knowingly sells or offers funeral merchandise or funeral services without an establishment permit.
6. Deliberately misrepresents or omits a material fact relative to the sale of funeral services or funeral merchandise under this chapter.

87 Acts, ch 30, §15; 90 Acts, ch 1213, § 8

523A.16 Rules.

The commissioner may adopt rules necessary to administer this chapter, in accordance with chapter 17A.

87 Acts, ch 30, §16

523A.17 Cease and desist orders.

If an audit or investigation provides reasonable evidence that a seller has violated any provisions of this chapter or any rule adopted under this chapter, the commissioner may issue an order directed at the seller to cease and desist from engaging in such act or practice.

90 Acts, ch 1213, §9

523A.18 Violations and penalties.

A violation of this chapter or rules adopted by the commissioner pursuant to this chapter is a violation of section 714.16, subsection 2, paragraph "a". The remedies and penalties provided by section 714.16, including but not limited to, provisions relating to injunctive relief and penalties, apply to violations of this chapter.

90 Acts, ch 1213, §10

523A.19 Receiverships.

1. The commissioner shall notify the attorney general if the commissioner finds that any seller engaged in the business subject to this chapter meets one or more of the following conditions:

- a. Is insolvent.
- b. Has utilized trust funds for personal or business purposes in a manner inconsistent with this chapter and the amount of funds currently held in trust is less than eighty percent of all payments made under the agreements referred to in section 523A.1.
- c. Has refused to pay any just claim or demand based on an agreement referred to in section 523A.1.
- d. The commissioner finds upon investigation that a seller is unable to pay any just claim or demand based on such agreements which have been legally determined to be just and outstanding.

2. The attorney general or the commissioner may apply to the district court in any county of the state for a receivership. Upon proof of any of the grounds for a receivership described in this section, the court may grant a receivership.

90 Acts, ch 1213, §11; 96 Acts, ch 1160, § 7

523A.20 Insurance division's regulatory fund.

The insurance division may authorize the creation of a special revenue fund in the state treasury, to be known as the insurance division regulatory fund. The commissioner shall allocate annually from the fees paid pursuant to section 523A.2, two dollars for each agreement reported on an establishment permit holder's annual report for deposit to the regulatory fund. The remainder of the fees collected pursuant to section 523A.2 shall be deposited into the general fund of the state. In addition, on May 1 of 1996 and 1997, the commissioner, to the extent necessary to fund consumer education, audits, investigations, payments under contract with licensed establishments to provide funeral merchandise or services in the event of statutory noncompliance by the initial seller, liquidations, and receiverships, shall assess establishment permit holders two dollars for each agreement reported on the establishment permit holder's annual report of sales executed during the preceding year, which shall be deposited in the insurance division regulatory fund. The moneys in the regulatory fund shall be retained in the fund. The moneys are appropriated and, subject to authorization by the commissioner, may be used to pay auditors, audit expenses, investigative expenses, and the expenses of receiverships established pursuant to section 523A.19. An annual assessment shall not be imposed if the current balance of the fund exceeds two hundred thousand dollars.

90 Acts, ch 1213, § 12; 91 Acts, ch 260, § 1241; 92 Acts, ch 1078, § 1; 95 Acts, ch 149, §8

523A.21 License revocation—recommendation by commissioner to board of mortuary science examiners.

Upon a determination by the commissioner that grounds exist for an administrative license revocation or suspension action by the board of mortuary science examiners under chapter 156, the commissioner may forward to the board the grounds for the determination, including all evidence in the possession of the commissioner, so that the board may proceed with the matter as deemed appropriate.

95 Acts, ch 149, §9

523A.22 Liquidation.

1. *Grounds for liquidation.* Upon receipt of a written request from the board of mortuary science examiners, the commissioner may petition the district court for an order directing the commissioner to liquidate a funeral establishment on any of the following grounds:

a. The funeral establishment did not deposit funds pursuant to section 523A.1 or withdrew funds in a manner inconsistent with this chapter and is insolvent.

b. The funeral establishment did not deposit funds pursuant to section 523A.1 or withdrew funds in a manner inconsistent with this chapter and the condition of the funeral establishment is such that the further transaction of business would be hazardous, financially or otherwise, to its preneed funeral customers or the public.

2. Liquidation order.

a. An order to liquidate the business of a funeral establishment shall appoint the commissioner as liquidator and shall direct the liquidator to immediately take possession of the assets of the funeral establishment and to administer them under the general supervision of the court. The liquidator is vested with the title to the property, contracts, and rights of action and the books and records of the funeral establishment ordered liquidated, wherever located, as of the entry of the final order of liquidation. The filing or recording of the order with the clerk of court and the recorder of deeds of the county in which its principal office or place of business is located, or, in the case of real estate with the recorder of deeds of the county where the property is located, is notice as a deed, bill of sale, or other evidence of title duly filed or recorded with the recorder of deeds.

b. Upon issuance of an order, the rights and liabilities of a funeral establishment and of the funeral establishment's creditors, preneed and at-need funeral customers, owners, and other persons interested in the funeral establishment's estate shall become fixed as of the date of the entry of the order of liquidation, except as provided in subsection 14.

c. At the time of petitioning for an order of liquidation, or at any time after the time of petitioning, the commissioner, after making appropriate findings of a funeral establishment's insolvency, may petition the court for a declaration of insolvency. After providing notice and hearing as it deems proper, the court may make the declaration.

d. An order issued under this section shall require accounting to the court by the liquidator. Accountings, at a minimum, must include all funds received or disbursed by the liquidator during the current period. An accounting shall be filed within one year of the liquidation order and at such other times as the court may require.

e. Within five days after the initiation of an appeal of an order of liquidation, which order has not been stayed, the commissioner shall present for the court's approval a plan for the continued performance of the funeral establishment's obligations during the pendency of an appeal. The plan shall provide for the continued performance of preneed and at-need funeral contracts in the normal course of events, notwithstanding the grounds alleged in support of the order of liquidation including the ground of insolvency. If the defendant funeral establishment's financial condition, in the judgment of the commissioner, will not support the full performance of all obligations during the appeal pendency period, the plan may prefer the claims of certain at-need and preneed funeral customers and claimants over creditors and interested parties as well as other at-need and preneed funeral customers and claimants, as the commissioner finds to be fair and equitable considering the relative circumstances of such at-need and preneed funeral customers

and claimants. The court shall examine the plan submitted by the commissioner and if it finds the plan to be in the best interests of the parties, the court shall approve the plan. An action shall not lie against the commissioner or any of the commissioner's deputies, agents, clerks, assistants, or attorneys by any party based on preference in an appeal pendency plan approved by the court.

3. Powers of liquidator.

a. The liquidator may do any of the following:

(1) Appoint a special deputy to act for the liquidator under this chapter, and determine the special deputy's reasonable compensation. The special deputy shall have all the powers of the liquidator granted by this section. The special deputy shall serve at the pleasure of the liquidator.

(2) Hire employees and agents, legal counsel, accountants, appraisers, consultants, and other personnel as the commissioner may deem necessary to assist in the liquidation.

(3) With the approval of the court, fix reasonable compensation of employees and agents, legal counsel, accountants, appraisers, and consultants.

(4) Pay reasonable compensation to persons appointed and defray from the funds or assets of the funeral establishment all expenses of taking possession of, conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and property of the funeral establishment. If the property of the funeral establishment does not contain sufficient cash or liquid assets to defray the costs incurred, the commissioner may advance the costs so incurred out of the insurance division regulatory fund. Amounts so advanced for expenses of administration shall be repaid to the insurance division regulatory fund for the use of the division out of the first available moneys of the funeral establishment.

(5) Hold hearings, subpoena witnesses, and compel their attendance, administer oaths, examine a person under oath, and compel a person to subscribe to the person's testimony after it has been correctly reduced to writing, and in connection to the proceedings require the production of books, papers, records, or other documents which the liquidator deems relevant to the inquiry.

(6) Collect debts and moneys due and claims belonging to the funeral establishment, wherever located. Pursuant to this subparagraph, the liquidator may do any of the following:

(a) Institute timely action in other jurisdictions to forestall garnishment and attachment proceedings against debts.

(b) Perform acts as are necessary or expedient to collect, conserve, or protect its assets or property, including the power to sell, compound, compromise, or assign debts for purposes of collection upon terms and conditions as the liquidator deems best.

(c) Pursue any creditor's remedies available to enforce claims.

(7) Conduct public and private sales of the property of the funeral establishment.

(8) Use assets of the funeral establishment under a liquidation order to transfer obligations of preneed funeral contracts to a solvent funeral establishment, if the transfer can be accomplished without prejudice to applicable priorities under subsection 18.

(9) Acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with property of the funeral establishment at its market value or upon terms and conditions as are fair and reasonable. The liquidator shall also have power to execute, acknowledge, and deliver deeds, assignments, releases, and other instruments necessary to effectuate a sale of property or other transaction in connection with the liquidation.

(10) Borrow money on the security of the funeral establishment's assets or without security and execute and deliver documents necessary to that transaction for the purpose of facilitating the

liquidation. Money borrowed pursuant to this subparagraph shall be repaid as an administrative expense and shall have priority over any other class 1 claims under the priority of distribution established in subsection 18.

(11) Enter into contracts as necessary to carry out the order to liquidate and affirm or disavow contracts to which the funeral establishment is a party.

(12) Continue to prosecute and to institute in the name of the funeral establishment or in the liquidator's own name any and all suits and other legal proceedings, in this state or elsewhere, and to abandon the prosecution of claims the liquidator deems unprofitable to pursue further.

(13) Prosecute an action on behalf of the creditors, at-need funeral customers, preneed funeral customers, or owners against an officer of the funeral establishment or any other person.

(14) Remove records and property of the funeral establishment to the offices of the commissioner or to other places as may be convenient for the purposes of efficient and orderly execution of the liquidation.

(15) Deposit in one or more banks in this state sums as are required for meeting current administration expenses and distributions.

(16) Unless the court orders otherwise, invest funds not currently needed.

(17) File necessary documents for recording in the office of a recorder of deeds or record office in this state or elsewhere where property of the funeral establishment is located.

(18) Assert defenses available to the funeral establishment as against third persons including statutes of limitations, statutes of fraud, and the defense of usury. A waiver of a defense by the funeral establishment after a petition in liquidation has been filed shall not bind the liquidator.

(19) Exercise and enforce the rights, remedies, and powers of a creditor, at-need funeral customer, preneed funeral customer, or owner, including the power to avoid transfer or lien that may be given by the general law and that is not included within subsections 7 through 9.

(20) Intervene in a proceeding wherever instituted that might lead to the appointment of a receiver or trustee, and act as the receiver or trustee whenever the appointment is offered.

(21) Exercise powers now held or later conferred upon receivers by the laws of this state which are not inconsistent with this chapter.

b. This subsection does not limit the liquidator or exclude the liquidator from exercising a power not listed in paragraph "a" that may be necessary or appropriate to accomplish the purposes of this chapter.

4. Notice to creditors and others.

a. Unless the court otherwise directs, the liquidator shall give notice of the liquidation order as soon as possible by doing all of the following:

(1) By first-class mail to all persons known or reasonably expected to have claims against the funeral establishment, including at-need and preneed funeral customers, by mailing a notice to their last known address as indicated by the records of the funeral establishment.

(2) By publication in a newspaper of general circulation in the county in which the funeral establishment has its principal place of business and in other locations as the liquidator deems appropriate.

b. Notice to potential claimants under paragraph "a" shall require claimants to file with the liquidator their claims together with proper proofs of the claim under subsection 13 on or before a date the liquidator shall specify in the notice. Claimants shall keep the liquidator informed of their changes of address, if any.

c. If notice is given pursuant to this section, the distribution of assets of the funeral

establishment under this chapter shall be conclusive with respect to claimants, whether or not a claimant actually received notice.

5. Actions by and against liquidator.

a. After the issuance of an order appointing a liquidator of a funeral establishment, an action at law or equity shall not be brought against the funeral establishment in this state or elsewhere, and existing actions shall not be maintained or further presented after issuance of the order. Whenever in the liquidator's judgment, protection of the estate of the funeral establishment necessitates intervention in an action against the funeral establishment that is pending outside this state, the liquidator may intervene in the action. The liquidator may defend, at the expense of the estate of the funeral establishment, an action in which the liquidator intervenes under this section.

b. Within two years or such additional time as applicable law may permit, the liquidator, after the issuance of an order for liquidation, may institute an action or proceeding on behalf of the estate of the funeral establishment upon any cause of action against which the period of limitation fixed by applicable law has not expired at the time of the filing of the petition upon which the order is entered. If a period of limitation is fixed by agreement for instituting a suit or proceeding upon a claim, or for filing a claim, proof of claim, proof of loss, demand, notice, or the like, or if in a proceeding, judicial or otherwise, a period of limitation is fixed in the proceeding or pursuant to applicable law for taking an action, filing a claim or pleading, or doing an act, and if the period had not expired at the date of the filing of the petition, the liquidator may, for the benefit of the estate, take any action or do any act, required of or permitted to the funeral establishment, within a period of one hundred eighty days subsequent to the entry of an order for liquidation, or within a further period as is shown to the satisfaction of the court not to be unfairly prejudicial to the other party.

c. A statute of limitation or defense of laches shall not run with respect to an action against a funeral establishment between the filing of a petition for liquidation against the funeral establishment and the denial of the petition. An action against the funeral establishment that might have been commenced when the petition was filed may be commenced for at least sixty days after the petition is denied.

6. Collection and list of assets.

a. As soon as practicable after the liquidation order but not later than one hundred twenty days after such order, the liquidator shall prepare in duplicate a list of the funeral establishment's assets. The list shall be amended or supplemented as the liquidator may determine. One copy shall be filed in the office of the clerk of court and one copy shall be retained for the liquidator's files. Amendments and supplements shall be similarly filed.

b. The liquidator shall reduce the assets to a degree of liquidity that is consistent with the effective execution of the liquidation.

c. A submission to the court for distribution of assets in accordance with subsection 11 fulfills the requirements of paragraph "a".

7. Fraudulent transfers prior to petition.

a. A transfer made and an obligation incurred by a funeral establishment within one year prior to the filing of a successful petition for liquidation under this chapter is fraudulent as to then existing and future creditors if made or incurred without fair consideration, or with actual intent to hinder, delay, or defraud either existing or future creditors. A fraudulent transfer made or an obligation incurred by a funeral establishment ordered to be liquidated under this chapter may be

avoided by the receiver, except as to a person who in good faith is a purchaser, lienor, or obligee for a present fair equivalent value. A purchaser, lienor, or obligee, who in good faith has given a consideration less than fair for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment. The court may, on due notice, order any such transfer or obligation to be preserved for the benefit of the estate, and in that event, the receiver shall succeed to and may enforce the rights of the purchaser, lienor, or obligee.

b. (1) A transfer of property other than real property is made when it becomes perfected so that a subsequent lien obtainable by legal or equitable proceedings on a simple contract could not become superior to the rights of the transferee under subsection 9, paragraph "c".

(2) A transfer of real property is made when it becomes perfected so that a subsequent bona fide purchaser from the funeral establishment could not obtain rights superior to the rights of the transferee.

(3) A transfer which creates an equitable lien is not perfected if there are available means by which a legal lien could be created.

(4) A transfer not perfected prior to the filing of a petition for liquidation is deemed to be made immediately before the filing of the successful petition.

(5) This subsection applies whether or not there are or were creditors who might have obtained a lien or persons who might have become bona fide purchasers.

8. *Fraudulent transfer after petition.*

a. After a petition for liquidation has been filed a transfer of real property of the funeral establishment made to a person acting in good faith is valid against the liquidator if made for a present fair equivalent value. If the transfer was not made for a present fair equivalent value, then the transfer is valid to the extent of the present consideration actually paid for which amount the transferee shall have a lien on the property transferred. The commencement of a proceeding in liquidation is constructive notice upon the recording of a copy of the petition for or order of liquidation with the recorder of deeds in the county where any real property in question is located. The exercise by a court of the United States or a state or jurisdiction to authorize a judicial sale of real property of the funeral establishment within a county in a state shall not be impaired by the pendency of a proceeding unless the copy is recorded in the county prior to the consummation of the judicial sale.

b. After a petition for liquidation has been filed and before either the receiver takes possession of the property of the funeral establishment or an order of liquidation is granted:

(1) A transfer of the property, other than real property, of the funeral establishment made to a person acting in good faith is valid against the receiver if made for a present fair equivalent value. If the transfer was not made for a present fair equivalent value, then the transfer is valid to the extent of the present consideration actually paid for which amount the transferee shall have a lien on the property transferred.

(2) If acting in good faith, a person indebted to the funeral establishment or holding property of the funeral establishment may pay the debt or deliver the property, or any part of the property, to the funeral establishment or upon the funeral establishment's order as if the petition were not pending.

(3) A person having actual knowledge of the pending liquidation is not acting in good faith.

(4) A person asserting the validity of a transfer under this subsection has the burden of proof. Except as provided in this subsection, a transfer by or on behalf of the funeral establishment after the date of the petition for liquidation by any person other than the liquidator is not valid against

the liquidator.

c. A person receiving any property from the funeral establishment or any benefit of the property of the funeral establishment which is a fraudulent transfer under paragraph "a" is personally liable for the property or benefit and shall account to the liquidator.

d. This chapter does not impair the negotiability of currency or negotiable instruments.

9. *Voidable preferences and liens.*

a. (1) A preference is a transfer of the property of a funeral establishment to or for the benefit of a creditor for an antecedent debt made or suffered by the funeral establishment within one year before the filing of a successful petition for liquidation under this chapter, the effect of which transfer may be to enable the creditor to obtain a greater percentage of this debt than another creditor of the same class would receive. If a liquidation order is entered while the funeral establishment is already subject to a receivership, then the transfers are preferences if made or suffered within one year before the filing of the successful petition for the receivership, or within two years before the filing of the successful petition for liquidation, whichever time is shorter.

(2) A preference may be avoided by the liquidator if any of the following exist:

(a) The funeral establishment was insolvent at the time of the transfer.

(b) The transfer was made within four months before the filing of the petition.

(c) At the time the transfer was made, the creditor receiving it or to be benefited by the transfer or the creditor's agent acting with reference to the transfer had reasonable cause to believe that the funeral establishment was insolvent or was about to become insolvent.

(d) The creditor receiving the transfer was an officer, or an employee, attorney, or other person who was in fact in a position of comparable influence in the funeral establishment to an officer whether or not the person held the position of an officer, owner, or other person, firm, corporation, association, or aggregation of persons with whom the funeral establishment did not deal at arm's length.

(3) Where the preference is voidable, the liquidator may recover the property. If the property has been converted, the liquidator may recover its value from a person who has received or converted the property. However, if a bona fide purchaser or lienor has given less than fair equivalent value, the purchaser or lienor shall have a lien upon the property to the extent of the consideration actually given. Where a preference by way of lien or security interest is voidable, the court may on due notice order the lien or security interest to be preserved for the benefit of the estate, in which event the lien or title shall pass to the liquidator.

b. (1) A transfer of property other than real property is made when it becomes perfected so that a subsequent lien obtainable by legal or equitable proceedings on a simple contract could not become superior to the rights of the transferee.

(2) A transfer of real property is made when it becomes perfected so that a subsequent bona fide purchaser from the funeral establishment could not obtain rights superior to the rights of the transferee.

(3) A transfer which creates an equitable lien is not perfected if there are available means by which a legal lien could be created.

(4) A transfer not perfected prior to the filing of a petition for liquidation is deemed to be made immediately before the filing of the successful petition.

(5) This subsection applies whether or not there are or were creditors who might have obtained liens or persons who might have become bona fide purchasers.

c. (1) A lien obtainable by legal or equitable proceedings upon a simple contract is one arising

in the ordinary course of the proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution, or like process, whether before, upon, or after judgment or decree and whether before or upon levy. It does not include liens which under applicable law are given a special priority over other liens which are prior in time.

(2) A lien obtainable by legal or equitable proceedings could become superior to the rights of a transferee, or a purchaser could obtain rights superior to the rights of a transferee within the meaning of paragraph "b", if such consequences would follow only from the lien or purchase itself, or from the lien or purchase followed by a step wholly within the control of the respective lienholder or purchaser, with or without the aid of ministerial action by public officials. However, a lien could not become superior and a purchase could not create superior rights for the purpose of paragraph "b" through an act subsequent to the obtaining of a lien or subsequent to a purchase which requires the agreement or concurrence of any third party or which requires further judicial action or ruling.

d. A transfer of property for or on account of a new and contemporaneous consideration, which is under paragraph "b" made or suffered after the transfer because of delay in perfecting it, does not become a transfer for or on account of an antecedent debt if any acts required by the applicable law to be performed in order to perfect the transfer as against liens or a bona fide purchaser's rights are performed within twenty-one days or any period expressly allowed by the law, whichever is less. A transfer to secure a future loan, if a loan is actually made, or a transfer which becomes security for a future loan, shall have the same effect as a transfer for or on account of a new and contemporaneous consideration.

e. If a lien voidable under paragraph "a", subparagraph (2), has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or indirectly by the transfer or the creation of a lien upon property of a funeral establishment before the filing of a petition under this chapter which results in a liquidation order, the indemnifying transfer or lien is also voidable.

f. The property affected by a lien voidable under paragraphs "a" and "e" is discharged from the lien. The property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the liquidator. However, the court may on due notice order a lien to be preserved for the benefit of the estate and the court may direct that the conveyance be executed to evidence the title of the liquidator.

g. The court shall have summary jurisdiction of a proceeding by the liquidator to hear and determine the rights of the parties under this section. Reasonable notice of hearing in the proceeding shall be given to all parties in interest, including the obligee of a releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, upon application of any party in interest, the court shall in the same proceeding ascertain the value of the property or lien. If the value is less than the amount for which the property is indemnified or less than the amount of the lien, the transferee or lienholder may elect to retain the property or lien upon payment of its value, as ascertained by the court, to the liquidator within the time as fixed by the court.

h. The liability of a surety under a releasing bond or other like obligation is discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and avoided by the liquidator. Where the property is retained under paragraph "g", the liability of the surety is discharged to the extent of the amount paid to the liquidator.

i. If a creditor has been preferred for property which becomes a part of the funeral

establishment's estate, and afterward in good faith gives the funeral establishment further credit without security of any kind, the amount of the new credit remaining unpaid at the time of the petition may be set off against the preference which would otherwise be recoverable from the creditor.

j. If within four months before the filing of a successful petition for liquidation under this chapter, or at any time in contemplation of a proceeding to liquidate, a funeral establishment, directly or indirectly, pays money or transfers property to an attorney for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the liquidator. The payment or transfer shall be held valid only to the extent of a reasonable amount to be determined by the court. The excess may be recovered by the liquidator for the benefit of the estate. However, where the attorney is in a position of influence in the funeral establishment or an affiliate, payment of any money or the transfer of any property to the attorney for services rendered or to be rendered shall be governed by the provision of paragraph "a", subparagraph (2), subparagraph subdivision (d).

k. (1) An officer, manager, employee, shareholder, subscriber, attorney, or any other person acting on behalf of the funeral establishment who knowingly participates in giving any preference when the person has reasonable cause to believe the funeral establishment is or is about to become insolvent at the time of the preference is personally liable to the liquidator for the amount of the preference. There is an inference that reasonable cause exists if the transfer was made within four months before the date of filing of this successful petition for liquidation.

(2) A person receiving property from the funeral establishment or the benefit of the property of the funeral establishment as a preference voidable under paragraph "a" is personally liable for the property and shall account to the liquidator.

(3) This subsection shall not prejudice any other claim by the liquidator against any person.

10. *Claims of holder of void or voidable rights.*

a. A claim of a creditor who has received or acquired a preference, lien, conveyance, transfer, assignment, or encumbrance, voidable under this chapter, shall not be allowed unless the creditor surrenders the preference, lien, conveyance, transfer, assignment, or encumbrance. If the avoidance is effected by a proceeding in which a final judgment has been entered, the claim shall not be allowed unless the money is paid or the property is delivered to the liquidator within thirty days from the date of the entering of the final judgment. However, the court having jurisdiction over the liquidation may allow further time if there is an appeal or other continuation of the proceeding.

b. A claim allowable under paragraph "a" by reason of a voluntary or involuntary avoidance, preference, lien, conveyance, transfer, assignment, or encumbrance may be filed as an excused late filing under subsection 12, if filed within thirty days from the date of the avoidance or within the further time allowed by the court under paragraph "a".

11. *Liquidator's proposal to distribute assets.*

a. From time to time as assets become available, the liquidator shall make application to the court for approval of a proposal to disburse assets out of marshaled assets.

b. The proposal shall at least include provisions for all of the following:

(1) Reserving amounts for the payment of all the following:

(a) Expenses of administration.

(b) To the extent of the value of the security held, the payment of claims of secured creditors.

(c) Claims falling within the priorities established in subsection 18, paragraphs "a" and "b".

(2) Disbursement of the assets marshaled to date and subsequent disbursement of assets as they become available.

c. Action on the application may be taken by the court provided that the liquidator's proposal complies with paragraph "b".

12. *Filing of claims.*

a. Proof of all claims shall be filed with the liquidator in the form required by subsection 13 on or before the last day for filing specified in the notice required under subsection 4.

b. The liquidator may permit a claimant making a late filing to share in distributions, whether past or future, as if the claimant were not late, to the extent that the payment will not prejudice the orderly administration of the liquidation under any of the following circumstances:

(1) The existence of the claim was not known to the claimant and that the claimant filed the claim as promptly as reasonably possible after learning of it.

(2) A transfer to a creditor was avoided under subsections 7 through 9, or was voluntarily surrendered under subsection 10, and that the filing satisfies the conditions of subsection 10.

(3) The valuation under subsection 17 of security held by a secured creditor shows a deficiency, which is filed within thirty days after the valuation.

c. The liquidator may consider any claim filed late and permit the claimant to receive distributions which are subsequently declared on any claims of the same or lower priority if the payment does not prejudice the orderly administration of the liquidation. The late-filing claimant shall receive at each distribution the same percentage of the amount allowed on the claim as is then being paid to claimants of any lower priority. This shall continue until the claim has been paid in full.

13. *Proof of claim.*

a. Proof of claim shall consist of a statement signed by the claimant that includes all of the following that are applicable:

(1) The particulars of the claim, including the consideration given for it.

(2) The identity and amount of the security on the claim.

(3) The payments, if any, made on the debt.

(4) A statement that the sum claimed is justly owing and that there is no setoff, counterclaim, or defense to the claim.

(5) Any right of priority of payment or other specific right asserted by the claimant.

(6) A copy of the written instrument which is the foundation of the claim.

(7) The name and address of the claimant and the attorney who represents the claimant, if any.

b. A claim need not be considered or allowed if it does not contain all the information identified in paragraph "a" which is applicable. The liquidator may require that a prescribed form be used and may require that other information and documents be included.

c. At any time the liquidator may request the claimant to present information or evidence supplementary to that required under paragraph "a", and may take testimony under oath, require production of affidavits or depositions, or otherwise obtain additional information or evidence.

d. A judgment or order against a funeral establishment entered after the date of filing of a successful petition for liquidation, or a judgment or order against the funeral establishment entered at any time by default or by collusion need not be considered as evidence of liability or of the amount of damages. A judgment or order against a funeral establishment before the filing of the petition need not be considered as evidence of liability or of the amount of damages.

14. *Special claims.*

a. A claim may be allowed even if contingent, if it is filed pursuant to subsection 12. The claim may be allowed and the claimant may participate in all distributions declared after it is filed to the extent that it does not prejudice the orderly administration of the liquidation.

b. Claims that are due except for the passage of time shall be treated as absolute claims are treated. However, the claims may be discounted at the legal rate of interest.

c. Claims made under employment contracts by directors, principal officers, or persons in fact performing similar functions or having similar powers are limited to payment for services rendered prior to the issuance of an order of liquidation under subsection 2.

15. *Disputed claims.*

a. If a claim is denied in whole or in part by the liquidator, written notice of the determination shall be given to the claimant or the claimant's attorney by first-class mail at the address shown in the proof of claim. Within sixty days from the mailing of the notice, the claimant may file objections with the liquidator. Unless a filing is made, the claimant shall not further object to the determination.

b. If objections are filed with the liquidator and the liquidator does not alter the denial of the claim as a result of the objections, the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing by first-class mail to the claimant or the claimant's attorney and to any other persons directly affected. The notice shall be given not less than ten nor more than thirty days before the date of the hearing. The matter shall be heard by the court or by a court-appointed referee. The referee shall submit findings of fact along with a recommendation.

16. *Claims of other person.* If a creditor, whose claim against a funeral establishment is secured in whole or in part by the undertaking of another person, fails to prove and file that claim, then the other person may do so in the creditor's name and shall be subrogated to the rights of the creditor, whether the claim has been filed by the creditor or by the other person in the creditor's name to the extent that the other person discharges the undertaking. However, in the absence of an agreement with the creditor to the contrary, the other person is not entitled to any distribution until the amount paid to the creditor on the undertaking plus the distributions paid on the claim from the funeral establishment's estate to the creditor equal the amount of the entire claim of the creditor. An excess received by the creditor shall be held by the creditor in trust for the other person.

17. *Secured creditor's claims.*

a. The value of security held by a secured creditor shall be determined in one of the following ways, as the court may direct:

(1) By converting the security into money according to the terms of the agreement pursuant to which the security was delivered to the creditors.

(2) By agreement, arbitration, compromise, or litigation between the creditor and the liquidator.

b. The determination shall be under the supervision and control of the court with due regard for the recommendation of the liquidator. The amount so determined shall be credited upon the secured claim. A deficiency shall be treated as an unsecured claim. If the claimant surrenders the security to the liquidator, the entire claim shall be allowed as if unsecured.

18. *Priority of distribution.* The priority of distribution of claims from the funeral establishment's estate shall be in accordance with the order in which each class of claims is set forth. Claims in each class shall be paid in full or adequate funds retained for the payment before

the members of the next class receive any payment. Subclasses shall not be established within a class. The order of distribution of claims is as follows:

a. Class 1. The costs and expenses of administration, including but not limited to the following:

(1) The actual and necessary costs of preserving or recovering the assets of the funeral establishment.

(2) Compensation for all authorized services rendered in the liquidation.

(3) Necessary filing fees.

(4) The fees and mileage payable to witnesses.

(5) Authorized reasonable attorney's fees and other professional services rendered in the liquidation.

b. Class 2. Reasonable compensation to employees for services performed to the extent that they do not exceed two months of monetary compensation and represent payment for services performed within one year before the filing of the petition for liquidation. Officers and directors are not entitled to the benefit of this priority. The priority is in lieu of other similar priority which may be authorized by law as to wages or compensation of employees.

c. Class 3. Claims under at-need and preneed funeral contracts.

d. Class 4. Claims of general creditors.

e. Class 5. Claims of the federal or any state or local government. Claims, including those of a governmental body for a penalty or forfeiture, are allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs incurred. The remainder of such claims shall be postponed to the class of claims under paragraph "g".

f. Class 6. Claims filed late or any other claims other than claims under paragraph "g".

g. Class 7. The claims of shareholders or other owners.

19. *Liquidator's recommendations to the court.*

a. The liquidator shall review claims duly filed in the liquidation and shall make further investigation as necessary. The liquidator may compound, compromise, or in any other manner negotiate the amount for which claims will be recommended to the court except where the liquidator is required by law to accept claims as settled by a person or organization. Unresolved disputes shall be determined under subsection 15. As soon as practicable, the liquidator shall present to the court a report of the claims against the funeral establishment with the liquidator's recommendations. The report shall include the name and address of each claimant and the amount of the claim finally recommended.

b. The court may approve, disapprove, or modify the report on claims by the liquidator. Reports not modified by the court within sixty days following submission by the liquidator shall be treated by the liquidator as allowed claims, subject to later modification or to rulings made by the court pursuant to subsection 15. A claim under a policy of insurance shall not be allowed for an amount in excess of the applicable policy limits.

20. *Distribution of assets.* Under the direction of the court, the liquidator shall pay distributions in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third-party claims. Distribution of assets in kind may be made at valuations set by agreement between the liquidator and the creditor and approved by the court.

21. *Unclaimed and withheld funds.*

a. Unclaimed funds subject to distribution remaining in the liquidator's hands when the liquidator is ready to apply to the court for discharge, including the amount distributable to a creditor, owner, or other person who is unknown or cannot be found, shall be deposited with the treasurer of state, and shall be paid without interest, except as provided in subsection 18, to the person entitled or the person's legal representative upon proof satisfactory to the treasurer of state of the right to the funds. An amount on deposit not claimed within six years from the discharge of the liquidator is deemed to have been abandoned and shall become the property of the state without formal escheat proceedings and be transferred to the insurance division regulatory fund.

b. Funds withheld under subsection 14 and not distributed shall upon discharge of the liquidator be deposited with the treasurer of state and paid pursuant to subsection 18. Sums remaining which under subsection 18 would revert to the undistributed assets of the funeral establishment shall be transferred to the insurance division regulatory fund and become the property of the state as provided under paragraph "a", unless the commissioner in the commissioner's discretion petitions the court to reopen the liquidation pursuant to subsection 23.

c. Notwithstanding any other provision of this chapter, funds as identified in paragraph "a", with the approval of the court, shall be made available to the commissioner for use in the detection and prevention of future insolvencies. The commissioner shall hold these funds in the insurance division regulatory fund and shall pay without interest, except as provided in subsection 18, to the person entitled to the funds or the person's legal representative upon proof satisfactory to the commissioner of the person's right to the funds. The funds shall be held by the commissioner for a period of two years at which time the rights and duties to the unclaimed funds shall vest in the commissioner.

22. *Termination of proceedings.*

a. When all assets justifying the expense of collection and distribution have been collected and distributed under this chapter, the liquidator shall apply to the court for discharge. The court may grant the discharge and make any other orders, including an order to transfer remaining funds that are uneconomical to distribute, as appropriate.

b. Any other person may apply to the court at any time for an order under paragraph "a". If the application is denied, the applicant shall pay the costs and expenses of the liquidator in resisting the application, including a reasonable attorney's fee.

23. *Reopening liquidation.* At any time after the liquidation proceeding has been terminated and the liquidator discharged, the commissioner or other interested party may petition the court to reopen the proceedings for good cause including the discovery of additional assets. The court shall order the proceeding reopened if it is satisfied that there is justification for the reopening.

24. *Disposition of records during and after termination of liquidation.* If it appears to the commissioner that the records of a funeral establishment in process of liquidation or completely liquidated are no longer useful, the commissioner may recommend to the court and the court shall direct what records shall be retained for future reference and what records shall be destroyed.

25. *External audit of receiver's books.* The court may order audits to be made of the books of the commissioner relating to a receivership established under this chapter, and a report of each audit shall be filed with the commissioner and with the court. The books, records, and other documents of the receivership shall be made available to the auditor at any time without notice. The expense of an audit shall be considered a cost of administration of the receivership.

95 Acts, ch 149, §10

523A.23 Minimum fidelity bond or insurance policy. Repealed by 96 Acts, ch 1160, § 20.

Appendix B

CHAPTER 523E CEMETERY MERCHANDISE

- 523E.1 Trust fund established—insurance.**
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- 523E.21 License revocation—recommendation by commissioner to board of mortuary science examiners.**
- 523E.22 Minimum fidelity bond or insurance policy. Repealed by 96 Acts, ch 1160, §20.**

523E.1 Trust fund established—insurance.

1. If an agreement is made by a person to furnish, upon the future death of a person named or implied in the agreement, cemetery merchandise, a minimum of one hundred twenty-five percent of the wholesale cost of the cemetery merchandise, based upon the current advertised prices available from a manufacturer or wholesaler who has delivered the same or substantially the same type of merchandise to the seller during the last twelve months, shall be and remain trust funds until purchase of the merchandise or the occurrence of the death of the person for whose benefit the funds were paid, unless the funds are sooner released to the person making the payment by mutual consent of the parties. Payments otherwise subject to this section are not exempt merely because they are held in certificates of deposit. The commissioner may adopt rules to prohibit the commingling of trust funds with other funds of the seller.

2. The seller shall keep copies of all price advertisements upon which the seller relies to determine the wholesale cost. The copies of price advertisements so maintained shall be made available to the commissioner upon request. The seller shall review wholesale costs no less than annually and make additional deposits as necessary to assure that the amount held in trust is always equal to or in excess of one hundred twenty-five percent of the wholesale cost of the

merchandise. The seller and the manufacturer or wholesaler upon whose price the seller relies to determine the wholesale cost shall not be commonly owned or affiliated.

3. Interest or income earned on amounts deposited in trust under this subsection shall remain in trust under the same terms and conditions as the payments made under the agreement and purchasers shall have a right to a total refund of principal and interest or income in the event of nonperformance.

4. If an agreement subject to this subsection is to be paid in installment payments, the seller shall deposit fifty percent of each payment in trust until the full amount to be trusted has been deposited. If the agreement is financed with or sold to a financial institution, the agreement shall be considered paid in full and the deposit requirements of this section shall be satisfied within fifteen days after the close of the month of receipt of the funds from the financial institution.

5. An agreement may be funded by insurance proceeds derived from a policy issued by an insurance company authorized to conduct business in this state. Such funding may be in lieu of a trust fund if the payments are made directly to the insurance company by the purchaser of the agreement.

6. This section does not apply to payments for merchandise delivered to the purchaser. Delivery includes storage in a warehouse under the control of the seller or any other warehouse or storage facility approved by the commissioner when a receipt of ownership in the name of the purchaser is delivered to the purchaser, the merchandise is insured against loss, the merchandise is protected against damage, title has been transferred to the purchaser, the merchandise is appropriately identified and described in a manner that it can be distinguished from other similar items of merchandise unless this identification requirement with respect to bronze merchandise is waived by the commissioner by rule, the method of storage allows for visual audits of the merchandise, and the annual reporting requirements of section 523E.2, subsection 1, are satisfied.

90 Acts, ch 1213, § 13; 92 Acts, ch 1078, § 12; 95 Acts, ch 149, §12, 13

523E.2 Deposit of funds—records—examinations—reports.

1. *a.* All funds held in trust under section 523E.1 shall be deposited in a state or federally insured bank, savings and loan association, or credit union authorized to conduct business in this state, or trust department of such bank, savings and loan association, or credit union, or in a trust company authorized to conduct business in this state, within fifteen days after the close of the month of receipt of the funds and shall be held as provided in paragraph "g" for the designated beneficiary until released pursuant to section 523E.1.

b. The seller under an agreement referred to in section 523E.1 shall maintain accurate records of all receipts, expenditures, interest or earnings, and disbursements relating to funds held in trust, and shall make these records available to the commissioner for examination at any reasonable time upon request.

c. The seller under an agreement referred to in section 523E.1 shall file with the commissioner not later than March 1 of each year a report including the following information:

(1) The name and address of the seller and the name and address of the establishment that will provide the cemetery merchandise.

(2) The balance of each trust account as of the end of the immediately preceding calendar year, identified by the name of the purchaser or the beneficiary, and a report of any amounts withdrawn from trust and the reason for each withdrawal.

(3) A description of insurance funding outstanding at the end of the immediately preceding calendar year, identified by the name of the purchaser or the beneficiary, and a report of any insurance payments received by the seller.

(4) A complete inventory of cemetery merchandise delivered in lieu of trusting pursuant to section 523E.1, including the location of the merchandise, serial numbers or warehouse receipt numbers, identified by the name of the purchaser or the beneficiary, and a verified statement of a certified public accountant that the certified public accountant has conducted a physical inventory of the cemetery merchandise and that each item of that merchandise is in the seller's possession at the specified location. The statement shall be on a form prescribed by the commissioner.

(5) The name of the purchaser, beneficiary, and the amount of each agreement referred to in section 523E.1 made in the preceding year and the date on which it was made.

(6) Other information reasonably required by the commissioner for purposes of administration of this chapter.

The report shall be accompanied by a filing fee determined by the commissioner which shall be sufficient to defray the costs of administering this chapter.

The commissioner, by rule, may waive receipt of any or all of the information listed in this lettered paragraph and adopt a shorter form of annual report. The shorter form may be used for all establishments or for establishments meeting specified criteria. If the commissioner does adopt a shorter form of annual report, the commissioner shall retain the authority to require all of the information listed above for audit purposes or otherwise. The commissioner may accept annual reports submitted in an electronic format, such as computer diskettes.

d. A financial institution referred to in paragraph "a" shall file notice with the commissioner of all funds deposited under the trust agreement. The notice shall be on forms prescribed by the commissioner and shall be filed not later than March 1 of each year. Each notice shall contain the required information for all deposits made during the previous calendar year. Forms may be obtained from the commissioner. The commissioner may accept notices submitted in an electronic format, such as computer diskettes.

e. Notwithstanding chapter 22, all records maintained by the commissioner under this subsection shall be confidential and shall not be made available for inspection or copying except upon approval of the commissioner or the attorney general.

f. The financial institution in which trust funds are held shall not be owned or under the control of the seller and shall not use any funds required to be held in trust pursuant to this chapter or chapter 566A to purchase an interest in any contract or agreement to which the seller is a party, or otherwise to invest, directly or indirectly, in the seller's business operations.

g. All funds required to be deposited for a purpose described in section 523E.1 shall be deposited in a manner consistent with one of the following:

(1) The payments shall be deposited directly by the purchaser in an irrevocable interest-bearing burial account in the name of the purchaser.

(2) The payments shall be deposited directly by the purchaser in a separate account in the name of the purchaser. The account may be made payable to the seller on the death of the purchaser or the designated beneficiary, provided that, until death, the purchaser retains the exclusive power to hold, manage, pledge, and invest the funds in the account and may revoke the trust and withdraw the funds, in whole or in part, at any time.

(3) The payments shall be deposited by the purchaser or the seller in a separate burial trust

account in the name of the purchaser, as trustee, in trust for the named beneficiary, to be held, invested, and administered as a trust account for the benefit and protection of the person for whose benefit the funds were paid. The depositor shall notify the financial institution of the existence and terms of the trust, including at a minimum the name of each party to the agreement, the name and address of the trustee, and the name and address of the beneficiary. The account may be made payable to the seller upon death of the designated beneficiary.

(4) The payments shall be deposited in the name of the trustee, as trustee, under the terms of a master trust agreement and the trustee may invest, reinvest, exchange, retain, sell, and otherwise manage the trust fund for the benefit and protection of the person for whose benefit the funds were paid.

In addition to the methods provided for in this section, the commissioner may by rule authorize other methods of deposit upon a finding that that method provides equivalent safety of the principal and interest or income and the seller does not have the ability to utilize any of the proceeds prior to performance. Money deposited under the master trust agreement may be commingled for investment purposes as long as each deposit includes a detailed listing of the amount deposited in trust for each beneficiary and a separate accounting of each purchaser's principal, interest, and income is maintained. Subject to the master trust agreement, the seller may appoint an independent investment advisor to act in an advisory capacity with the trustee relative to the investment of the trust funds. The trust shall pay the cost of the operation of the trust and any annual audit fees.

The financial institution, or the trust department of the financial institution, in which trust funds are held may serve as trustee to the extent that the organization has been granted those powers under the laws of this state or the United States. The seller or any officer, director, agent, employee, or affiliate of the seller shall not serve as trustee.

2. In addition to complying with subsection 1, each seller under an agreement referred to in section 523E.1 shall file annually with the commissioner an authorization for the commissioner or a designee to investigate, audit, and verify all funds, accounts, safe-deposit boxes, and other evidence of trust funds held by or in a financial institution.

3. The commissioner shall adopt rules under chapter 17A specifying the form, content, and cost of the forms for the notices and disclosures required by this section, and shall sell blank forms at that cost to any person on request.

4. If a seller under an agreement referred to in section 523E.1 ceases to do business, whether voluntarily or involuntarily, and the obligation to provide the merchandise and services has not been assumed by another funeral home or cemetery holding an establishment permit issued under this chapter, all funds held in trust under section 523E.1, including accrued interest or earnings, shall be repaid to the purchaser under the agreement.

5. The commissioner may require the performance of an audit of the seller's business by a certified public accountant if the commissioner receives reasonable evidence that the seller is not complying with this chapter. The audit shall be paid for by the seller, and a copy of the report of audit shall be delivered to the commissioner and to the seller.

6. This chapter does not prohibit the funding of an agreement by insurance proceeds derived from a policy issued by an insurance company authorized to conduct business in this state. The seller of an agreement subject to this chapter which is to be funded by insurance proceeds shall obtain all permits required to be obtained under this chapter and comply with the reporting requirements of this section.

90 Acts, ch 1213, §14; 95 Acts, ch 149, §14, 15; 96 Acts, ch 1160, § 11, 12; 97 Acts, ch 23, §63

523E.3 and 523E.4 Reserved.

523E.5 Scope of chapter—definitions.

1. This chapter applies only to the sale of cemetery merchandise.
2. As used in this chapter:
 - a. "*Cemetery merchandise*" means grave markers, tombstones, ornamental merchandise, and monuments if the agreement does not require installation within twelve months of the purchase.
 - b. "*Commissioner*" means the commissioner of insurance or the deputy appointed under section 502.601.

90 Acts, ch 1213, §15

523E.6 Compliance with other laws.

The seller of cemetery merchandise shall comply with chapter 555A with respect to all contracts that are subject to regulation under this chapter. A failure to comply is subject to the remedies and penalties provided in that chapter.

90 Acts, ch 1213, §16

523E.7 Bond in lieu of trust fund.

1. In lieu of the trust fund required by sections 523E.1 and 523E.2, a seller may file with the commissioner a surety bond that is issued by a surety company authorized to do business in this state and that is conditioned on the faithful performance by the seller of agreements subject to this chapter. The liability of the surety extends to each agreement that is subject to this chapter and that is executed during the time the bond is in force and until performance of the agreement or rescission of the agreement by mutual consent of the parties; and, to the extent expressly agreed to in writing by the surety company under subsection 3, paragraph "b", the liability of the surety extends to each agreement that is subject to this chapter and that was executed prior to the time the bond was in force and until performance of the agreement or rescission of the agreement by mutual consent of the parties. A buyer who is aggrieved by a breach of a condition of the bond covering the contract of that buyer may maintain an action against the bond, provided that if, at the time of the breach, the buyer is aware of the buyer's rights under the bond and how to file a claim against the bond, the surety shall not be liable as a result of any breach of condition unless notice of a claim is received by the surety within sixty days following the discovery of the acts, omissions, or conditions constituting the breach of condition, except as otherwise provided in subsection 2. A surety bond submitted under this subsection shall not be canceled by a surety company except upon a written notice of cancellation given by the surety company to the commissioner by restricted certified mail, and the surety bond shall not be canceled prior to the expiration of sixty days after the receipt by the commissioner of the notice of cancellation.

2. If a seller becomes insolvent or otherwise ceases to engage in business prior to or within sixty days after the cancellation of a bond submitted under subsection 1, the seller shall be deemed to have breached the conditions of the surety bond with respect to all outstanding contracts subject to this chapter as of the day prior to cancellation of the bond. The commissioner shall mail written notice by restricted certified mail to the buyer under each outstanding contract of the seller that a claim against the bond must be filed with the surety

company within sixty days after the date of mailing of the notice. The surety company shall cease to be liable with respect to all agreements except those for which claims are filed with the surety company within sixty days after the date the notices are mailed by the commissioner.

3. If a surety bond is canceled by a surety company under any conditions other than those specified in subsection 2, the seller shall comply with paragraphs "a" and "b":

a. The seller shall comply with the trust requirements of sections 523E.1 and 523E.2 with respect to all contracts subject to this chapter that are executed on or after the effective date of cancellation of the surety bond, or the seller may submit a substitute surety bond meeting the requirements of subsection 1, but the seller must comply with sections 523E.1 and 523E.2 with respect to any contracts executed on or after the effective date of cancellation of the earlier surety bond and prior to the date on which the later surety bond takes effect.

b. Within sixty days after the effective date of the cancellation of the surety bond, the seller shall submit to the commissioner an undertaking by another surety company that a substitute surety bond meeting the requirements of subsection 1 is in effect and that the liability of the substitute surety bond extends to all outstanding contracts of the seller that were executed but not performed or extinguished prior to the effective date of the substitute surety bond, or the seller shall submit to the commissioner a financial statement accompanied by an unqualified opinion based upon an audit performed by a certified public accountant licensed in this state certifying the total amount of outstanding liabilities of the seller on contracts subject to this chapter and proof of deposit by the seller in trust under sections 523E.1 and 523E.2 of either the amount specified in section 523E.1, including interest as set by the commissioner based on the interest which would have been earned had the funds been maintained in trust, with respect to all of those outstanding contracts or, where applicable, that delivery of merchandise has been made in compliance with section 523E.1. The surety may require such security as is necessary to comply with this section. Upon compliance by the seller with this paragraph, the surety company canceling the surety bond shall cease to be liable with respect to any outstanding contracts of the seller except those with respect to which a breach of condition occurred prior to cancellation and timely claims were filed.

4. Section 523E.2, subsection 1, paragraphs "b", "c", and "e", subsection 5, and, to the extent it is applicable, subsection 6, apply to sellers whose agreements are covered by a surety bond maintained under this section, and section 523E.2 continues to apply to any agreements of those sellers that are not covered by a surety bond maintained under this section.

5. Upon receiving a notice of cancellation of a surety bond, the commissioner shall notify the seller of the requirements of this chapter resulting from cancellation of the bond. The notice may be in the form of a copy of this section and sections 523E.1 and 523E.2.

6. Upon receiving a notice of cancellation, unless the seller has complied with the requirements of this section, the attorney general shall seek an injunction to prohibit the seller from making further agreements subject to this chapter and shall commence an action to attach and levy execution upon property of the seller when the seller fails to perform an agreement subject to this chapter, to the extent necessary to secure compliance with this chapter, and the county attorney may bring criminal charges under section 523E.15.

7. The surety under this section shall not be owned or under the control of the seller.

90 Acts, ch 1213, §17

523E.8 Disclosures.

1. Every agreement for cemetery merchandise under this chapter shall be written in clear, understandable language and shall be printed or typed in easy-to-read type, size, and style, and shall:

a. Identify the seller, the salesperson's permit and establishment name and permit number, the expiration date of the salesperson's permit, the purchaser, and the person for whom the cemetery merchandise is purchased if other than the purchaser.

b. Specify the cemetery merchandise to be provided, and the cost of each merchandise item.

c. State clearly the conditions on which substitution will be allowed.

d. Set forth the total purchase price and the terms under which it is to be paid.

e. State clearly whether the agreement is a guaranteed price contract or a nonguaranteed price contract. Each nonguaranteed price contract shall contain in twelve point bold type, an explanation of the consequences in substantially the following language:

THE PRICES OF MERCHANDISE AND SERVICES UNDER THIS CONTRACT ARE SUBJECT TO CHANGE IN THE FUTURE. ANY FUNDS PAID UNDER THIS CONTRACT ARE ONLY A DEPOSIT TO BE APPLIED, TOGETHER WITH ACCRUED INCOME, TOWARD THE FINAL COSTS OF THE MERCHANDISE OR SERVICES CONTRACTED FOR. ADDITIONAL CHARGES MAY BE REQUIRED.

f. State clearly whether the agreement is a revocable or irrevocable contract, and who has the authority to revoke the contract.

g. State the amount or percentage of money to be placed in trust.

h. Explain the disposition of the income generated from investments, include a statement of fees, expenses, and taxes which may be deducted, and include a statement of the buyer's responsibility for income taxes owed on the income, if applicable.

i. Specify the purchaser's right to cancel and damages for cancellation, if any.

j. Include an explanation of regulatory oversight by the insurance division in twelve point bold type, in substantially the following language:

THIS CONTRACT IS SUBJECT TO REGULATIONS ADMINISTERED BY THE IOWA INSURANCE DIVISION. YOU MAY CALL THE INSURANCE DIVISION AT (INSERT TELEPHONE NUMBER). WRITTEN INQUIRIES OR COMPLAINTS SHOULD BE MAILED TO THE FOLLOWING ADDRESS: (INSERT ADDRESS).

k. State that if, after all payments are made in accordance with the conditions and terms of the agreement for cemetery merchandise, any funds remain in the nonguaranteed irrevocable burial trust fund, the seller shall disburse the remaining funds to a personal representative of the deceased as defined in section 633.3, or to the deceased's surviving next of kin, or to the director of human services, in accordance with section 523A.3.

2. The commissioner may adopt rules establishing disclosure and format requirements to promote consumers' understanding of the cemetery merchandise purchased and the available funding mechanisms under an agreement for cemetery merchandise under this chapter.

3. Every agreement shall be signed by the purchaser and the seller.

4. The seller shall disclose at the time an application is made by an individual and prior to accepting the applicant's initial premium or deposit for a preneed funeral contract or

prearrangement subject to section 523E.1 which is funded by a life insurance policy, the following information:

- a. That a life insurance policy is involved or being used to fund an agreement.
- b. The nature of the relationship among the soliciting agent or agents, the provider of the funeral or cemetery merchandise or services, the administrator, and any other person.
- c. The relationship of the life insurance policy to the funding of the prearrangement and the nature and existence of any guarantees relating to the prearrangement.
- d. The impact on the prearrangement of the following:
 - (1) Changes in the life insurance policy including, but not limited to, changes in the assignment, beneficiary designation, or use of proceeds.
 - (2) Any penalties to be incurred by the policyholder as a result of the failure to make premium payments.
 - (3) Penalties to be incurred or cash to be received as a result of the cancellation or surrender of the life insurance policy.
- e. A list of merchandise and services which are applied or contracted for in the prearrangement and all relevant information concerning the price of the merchandise and services, including an indication that the purchase price is either guaranteed at the time of purchase or to be determined at the time of need.
- f. All relevant information concerning what occurs and whether any entitlements or obligations arise if there is a difference between the proceeds of the life insurance policy and the amount actually needed to fund the agreement.
- g. Any penalties or restrictions, including but not limited to, geographic restrictions or the inability of the provider to perform, on the delivery of merchandise, services, or the prearrangement guarantee.
- h. That a sales commission or other form of compensation is being paid and, if so, the identity of the individuals or entities to whom it is paid.

90 Acts, ch 1213, §18; 95 Acts, ch 68, §5; 95 Acts, ch 149, §16–18; 96 Acts, ch 1093, § 3; 98 Acts, ch 1189, §22

Subsection 1, paragraph j amended

523E.9 Establishment permits.

1. A person, as defined in section 4.1, subsection 20, shall not engage in the business of selling, promoting, or otherwise entering into agreements to furnish, upon the future death of a person named or implied in the agreement, cemetery merchandise without an establishment permit as provided for in this section. An establishment doing business shall obtain a permit for each location.

2. An applicant for a permit under this section shall submit to the commissioner an application on a form provided by the commissioner. The commissioner shall permit application for a permit under section 523A.9 on the same form as for this section provided the scope of sales by the establishment is clearly indicated to include funeral services, funeral merchandise, or cemetery merchandise, or a combination of any of these. The application shall include at a minimum the following information:

- a. The name and location of the applicant's business.
- b. The name and location of the provider who will provide the cemetery merchandise.
- c. The name and address of each owner, officer, or other official of the applicant's business, or

in the event that the applicant is a corporation, the names and addresses of the chief executive officer and the members of the board of directors.

d. The types of cemetery merchandise to be sold.

An application for a permit pursuant to this section shall be accompanied by a copy of each sales agreement the permit holder will use for sales of cemetery merchandise under section 523E.1.

A permit holder shall inform the commissioner of changes in the information within thirty days of the change.

3. The applicant for a permit shall submit a fee in the amount of fifty dollars; provided, however, that if an applicant also applies for or has a permit under section 523A.9, no additional fee shall be required under this subsection.

4. Permits granted under this section are not assignable.

5. Upon the filing of an application for a permit, the commissioner shall issue the permit unless the commissioner finds any of the following:

a. The applicant is insolvent.

b. The applicant has failed to comply with any terms or conditions of this chapter and that failure is deemed by the commissioner to substantially impede the applicant's ability to abide by this chapter.

c. The applicant has been convicted of a criminal offense involving dishonesty or false statement.

d. The applicant cannot provide the cemetery merchandise the applicant purports to sell.

6. If the commissioner does not grant the permit, the commissioner shall notify the applicant in writing of the denial and the reasons for the denial. The commissioner shall approve or deny every application for a license within ninety days after the filing thereof, but any failure of the commissioner to act within that time period shall not be deemed to be an approval of the application.

90 Acts, ch 1213, §19

523E.10 Sales permits.

1. An individual shall not sell, promote, or otherwise enter into an agreement to furnish, upon the future death of a person named or implied in the agreement, cemetery merchandise without a permit as provided for in this section. An individual permit holder must be an employee or agent of an establishment which holds a permit pursuant to section 523E.9 and which can deliver the cemetery merchandise being sold. The establishment is liable for the acts of its employees and agents, independent or otherwise, performed in the course of obtaining or attempting to obtain an agreement for the sale of cemetery merchandise under section 523E.1.

2. An applicant for a permit under this section shall submit to the commissioner an application on a form provided by the commissioner. The commissioner shall permit application for a permit under section 523A.10 on the same form as for this section provided the scope of sales by the individual is clearly indicated to include funeral services, funeral merchandise, or cemetery merchandise, or a combination of any of these. The application shall include at a minimum the following information:

a. The name and address of the applicant.

b. The name and address of the applicant's employer or the establishment on whose behalf the applicant will be making or attempting to make sales, and, if different, the name and address of

the provider who will provide the cemetery merchandise.

A permit holder shall inform the commissioner of changes in the information within thirty days of the change.

3. The permit shall be deemed effective upon filing the application with the commissioner. The permit shall disclose on its face the permit holder's employer or the establishment on whose behalf the applicant will be making or attempting to make sales, the permit number, and the expiration date. An initial permit under this section shall expire one year from the date the application is filed. The permit may be renewed for a period of four years.

4. The initial application fee shall be five dollars and the renewal fee shall be twenty dollars; provided, however, that if an applicant also applies for or has a permit under section 523A.10, no additional fee shall be required under this subsection.

5. Permits granted under this section are not assignable.

6. The commissioner may revoke a permit if the commissioner determines that the permit holder has been convicted of a criminal offense involving dishonesty or false statement or that the establishment cannot provide the cemetery merchandise the establishment purports to sell.

90 Acts, ch 1213, §20; 96 Acts, ch 1160, § 13

523E.11 Investigations.

The attorney general or the commissioner may, for the purpose of discovering violations of this chapter or any rules adopted under this chapter:

1. Investigate the business and examine the books, accounts, records, and files used by every permit holder under this chapter.

2. Notwithstanding chapter 22, keep confidential the information obtained in the course of an investigation. However, if the commissioner determines that it is necessary or appropriate in the public interest or for the protection of the public, the commissioner may share information with other regulatory authorities or governmental agencies, or may publish information concerning a violation of this chapter or a rule or order under this chapter.

3. Administer oaths and affirmations, subpoena witnesses, receive evidence, and require the production of documents and records in connection with an investigation or proceeding being conducted pursuant to this chapter.

4. Apply to the district court for issuance of an order requiring a person's appearance before the commissioner or attorney general, or a designee of either or both, in cases where the person has refused to obey a subpoena issued by the commissioner or attorney general. The person may also be required to produce documentary evidence germane to the subject of the investigation. Failure to obey a court order under this subsection constitutes contempt of court.

90 Acts, ch 1213, §21; 96 Acts, ch 1160, § 14

523E.12 Suspension or revocation of permits.

1. The commissioner may, pursuant to chapter 17A, suspend or revoke any permit issued pursuant to this chapter if the commissioner finds any of the following:

a. The permit holder has violated any provisions of this chapter or any rule adopted under this chapter or any other state or federal law applicable to the conduct of the permit holder's business.

b. Any fact or condition exists which, if it had existed at the time of the original application for the permit, would have warranted the commissioner refusing originally to issue the permit.

c. The permit holder is found upon investigation to be insolvent, in which case the permit shall

be revoked immediately.

d. The permit holder, for the purpose of avoiding a trusting requirement under section 523A.1 or 523E.1, attributes amounts paid pursuant to the agreement to funeral merchandise or cemetery merchandise that is delivered under section 523A.1 or to cemetery merchandise rather than to funeral services sold to the purchaser. The sale of funeral services at a lower price when the sale is made in conjunction with the sale of funeral merchandise or cemetery merchandise to be delivered pursuant to section 523A.1 than the services are regularly and customarily sold for when not sold in conjunction with funeral merchandise or cemetery merchandise is evidence that the permit holder is acting with the purpose of avoiding a trusting requirement under section 523A.1 or 523E.1.

e. The permit holder is found upon investigation to have engaged in a deceptive act or practice or has deliberately misrepresented or omitted a material fact relative to the sale of funeral services, funeral merchandise, or cemetery merchandise under this chapter.

f. The permit holder is found to have sold the establishment and has not filed notice of the sale with the commissioner prior to the sale. The permit shall be revoked thirty days following such sale.

2. The commissioner may, on good cause shown, suspend any permit for a period not exceeding thirty days, pending investigation.

Except as provided in the preceding paragraph, a permit shall not be revoked or suspended except after notice and hearing in accordance with chapter 17A.

3. Any permit holder may surrender a permit by delivering to the commissioner written notice that the permit holder surrenders the permit, but the surrender shall not affect the permit holder's civil or criminal liability for acts committed before the surrender.

4. Revocation, suspension, or surrender of a permit does not impair or affect the obligation of any preexisting lawful contract between the permit holder and any person.

90 Acts, ch 1213, §22; 96 Acts, ch 1160, § 15

523E.13 Prosecution for violations of law.

If the commissioner believes that grounds exist for the criminal prosecution of persons subject to this chapter for violations of this chapter or any other law of this state, the commissioner may forward to the attorney general or the county attorney the grounds for the belief, including all evidence in the commissioner's possession, in order that the attorney general or the county attorney may proceed with the matter as deemed appropriate. At the request of the attorney general, the county attorney shall appear and prosecute the action when brought in the county attorney's county.

90 Acts, ch 1213, §23

523E.14 Injunctions.

The attorney general or the commissioner may apply to the district court in any county of the state for an injunction to restrain a person subject to this chapter and any agents, employees, or associates of the person from engaging in conduct or practices deemed contrary to the public interest. In any proceeding for an injunction, the attorney general or the commissioner may apply to the court for the issuance of a subpoena to require the appearance of a defendant and the defendant's agents and any documents, books, and records germane to the hearing upon the petition for an injunction. Upon proof of any of the offenses described in the petition for

injunction the court may grant the injunction. The attorney general or the commissioner shall not be required to post a bond.

90 Acts, ch 1213, §24; 96 Acts, ch 1160, § 16; 98 Acts, ch 1189, §23

Section amended

523E.15 Fraudulent practices.

A person who commits any of the following acts commits a fraudulent practice and is punishable as provided in chapter 714:

1. Knowingly fails to comply with any requirement of this chapter.
2. Knowingly makes, causes to be made, or subscribes to a false statement or representation in a report or other document required under this chapter, or renders such a report or document misleading through the deliberate omission of information properly belonging in the report or document.
3. Conspires to defraud in connection with the sale of cemetery merchandise under this chapter.
4. Fails to deposit funds in compliance with section 523E.1, or withdraws funds in a manner inconsistent with this chapter.
5. Knowingly sells or offers cemetery merchandise without an establishment permit.
6. Deliberately misrepresents or omits a material fact relative to the sale of cemetery merchandise under this chapter.

90 Acts, ch 1213, §25

523E.16 Rules.

The commissioner may adopt rules necessary to administer this chapter, in accordance with chapter 17A.

90 Acts, ch 1213, §26

523E.17 Cease and desist orders.

If an audit or investigation provides reasonable evidence that a seller has violated any provisions of this chapter or any rule adopted under this chapter, the commissioner may issue an order directed at the seller to cease and desist from engaging in such act or practice.

90 Acts, ch 1213, §27

523E.18 Violations and penalties.

A violation of this chapter or rules adopted by the commissioner pursuant to this chapter is a violation of section 714.16, subsection 2, paragraph "a". The remedies and penalties provided by section 714.16, including but not limited to, provisions relating to injunctive relief and penalties, apply to violations of this chapter.

90 Acts, ch 1213, §28

523E.19 Receiverships.

1. The commissioner shall notify the attorney general if the commissioner finds that any seller engaged in the business subject to this chapter meets one or more of the following conditions:

- a. Is insolvent.
- b. Has utilized trust funds for personal or business purposes in a manner inconsistent with this chapter and the amount of funds currently held in trust is less than fifty percent of all payments

made under the agreements referred to in section 523E.1.

c. Has refused to pay any just claim or demand based on an agreement referred to in section 523E.1.

d. The commissioner finds upon investigation that a seller is unable to pay any just claim or demand based on such agreements which have been legally determined to be just and outstanding.

2. The attorney general or the commissioner may apply to the district court in any county of the state for a receivership. Upon proof of any of the grounds for a receivership described in this section, the court may grant a receivership.

90 Acts, ch 1213, §29; 96 Acts, ch 1160, § 17

523E.20 Insurance division's regulatory fund.

The insurance division may authorize the creation of a special revenue fund in the state treasury, to be known as the insurance division regulatory fund. The commissioner shall allocate annually from the fees paid pursuant to section 523E.2, two dollars for each agreement reported on an establishment permit holder's annual report for deposit to the regulatory fund. The remainder of the fees collected pursuant to section 523E.2 shall be deposited into the general fund of the state. In addition, on May 1 of 1996 and 1997, the commissioner, to the extent necessary to fund consumer education, audits, investigations, payments under contract with licensed establishments to provide funeral and cemetery merchandise or services in the event of statutory noncompliance by the initial seller, liquidations, and receiverships, shall assess establishment permit holders two dollars for each agreement reported on the establishment permit holder's annual report of sales executed during the preceding year, which shall be deposited in the insurance division regulatory fund. The moneys in the regulatory fund shall be retained in the fund. The moneys are appropriated and, subject to authorization by the commissioner, may be used to pay auditors, audit expenses, investigative expenses, and the expenses of receiverships established pursuant to section 523E.19. An annual assessment shall not be imposed if the current balance of the fund exceeds two hundred thousand dollars.

90 Acts, ch 1213, § 30; 91 Acts, ch 260, § 1242; 92 Acts, ch 1078, § 13; 95 Acts, ch 149, §19

523E.21 License revocation—recommendation by commissioner to board of mortuary science examiners.

Upon a determination by the commissioner that grounds exist for an administrative license revocation action by the board of mortuary science examiners under chapter 156, the commissioner may forward to the board the grounds for the determination, including all evidence in the possession of the commissioner, so that the board may proceed with the matter as deemed appropriate.

95 Acts, ch 149, §20

523E.22 Minimum fidelity bond or insurance policy. Repealed by 96 Acts, ch 1160, § 20.

Appendix C

This appendix is a summary of the findings of fact for Allegation #1:

- *Early 1989*: Steffen buys 121 life insurance policies.
- *July 3, 1989*: Steffen sells Clinton Memorial to Gailbreath.
- *December 1989*: Gailbreath cancels 121 life insurance policies.
- *August 1990 — June 1991*: Unit investigates cancellation of insurance policies and finds other problems.
- *July 3, 1991*: Unit suspends Clinton Memorial's sales permit pending hearing on whether to revoke.
- *July 16, 1991*: Clinton Memorial makes unlicensed sale.
- *July 25, 1991*: Hearing held. Second hearing set for October 15, 1991. Suspension continued.
- *August 1, 1991 — October 1, 1991*: Clinton Memorial makes three more unlicensed sales.
- *October 14, 1991*: Unit continues the permit suspension and sets goals with March 1, 1992 deadline.
- *November 11, 1991 — April 6, 1992*: Clinton Memorial makes five more unlicensed sales.
- *April 7, 1992*: Unit receives Clinton Memorial's annual report for 1991. Includes all of the 1991 unlicensed sales, along with the date of the sale for three.
- *March 1992*: Clinton Memorial claims it is about to receive bank loan.
- *May 1, 1992*: None of the goals fully met. Unit partly reinstates sales permit and sets goals with July 1, 1992 deadline.
- *July 30, 1992*: None of the goals met. Unit sets hearing for September 10, 1992 on whether to revoke permit.
- *September 1992*: Hearing cancelled. Discussions about having third-party supervisor to oversee operations.
- *December 3, 1992*: Unit appoints Bribresco supervisor and operations manager and imposes several requirements.
- *December 30, 1992*: Clinton Memorial receives \$153,514 loan from bank.
- *January 22, 1993*: Unit completely reinstates sales permit.

- *March 17, 1993:* Unit receives Clinton Memorial's annual report for 1992. Shows it received \$176,907 for pre-need contracts sold in previous years but put none of those monies into trust.
- *April 2, 1993:* Bribiesco submits report stating shortages were larger than anticipated. Had used loan proceeds to buy 38 chapel vaults and life insurance policies. No other progress noted.
- *October 12, 1993:* Bribiesco submits report stating 55 additional chapel vaults had been ordered. No other progress noted.
- *December 1-3, 1993:* Unit audits Clinton Memorial. Finds failure to trust all contract payments.
- *February 1, 1994:* Gailbreath admits not trusting for new accounts.
- *February 4, 1994:* Unit re-suspends sales permit pending hearing on whether to revoke.
- *February 21-June 14, 1994:* Clinton Memorial makes five unlicensed sales. Including those sales, Clinton Memorial made 44 new pre-need sales following the Unit's October 14, 1991 order. Each of those customers lost money on their payments, a total of \$84,195.
- *May-July 1994:* Clinton Memorial buys 28 eternal rest beds.
- *July 5, 1994:* After Clinton Memorial defaults on mortgage, bank takes deed to property and assets, initiating the non-judicial foreclosure process.
- *August 1, 1994:* Attorney General files petition for receivership in Clinton County District Court. Press release says bank plans to sell most of the assets to Gary Nelson and Nelson plans to offer credits for most unreimbursed payments.
- *August 18, 1994:* Court appoints Britson as receiver.
- *September 14, 1994:* Gailbreath arrested on one count of first-degree theft.
- *September 16, 1994:* Attorney General files amended petition naming Bribiesco as co-defendant and seeking restitution and civil penalties. Bribiesco later agrees to pay \$13,000.
- *November 30, 1994:* Britson submits report to consumers. Contains lists showing who had paid for chapel vaults and eternal rest beds. Notes large gap between number of purchasers and number of units inventoried. Presents his plan for how to distribute units in inventory. Also contains lists of customers who have trust monies and/or insurance policies in their name, with instructions on how to get their money back.
- *December 15, 1994:* Gailbreath pleads guilty to first-degree theft. Later sentenced to serve up to 10 years in prison and ordered to pay \$40,730 in restitution to the 13 customers whose losses were the basis for the criminal charge.
- *June 5, 1995:* Default judgment entered against Clinton Memorial for \$1,918,287.

- *February 22, 1996:* Attorney General's office and Gailbreath agree Gailbreath would pay \$1,000,000 for victim restitution. (None has been paid.)



THOMAS J. VILSACK
GOVERNOR

SALLY J. PEDERSON
LT. GOVERNOR

Therese M. Vaughan, Commissioner

INSURANCE DIVISION
IOWA DEPARTMENT OF COMMERCE

August 24, 1999

William P. Angrick II
Citizens' Aide/ Ombudsman
215 East 7th Street
Des Moines, IA 50319-0231

AUG 24

Re: Clinton Memorial Park Cemetery & Funeral Home, Inc. (94-83)
Agency Reply – Executive Summary

Dear Mr. Angrick:

We are pleased that the Ombudsman found unsubstantiated the allegation that the Division was unreasonably tardy in notifying Clinton Memorial customers of the alleged violations. Similarly, we are pleased with the conclusion the Division did not fail to meet its statutory responsibilities in this matter. We respectfully disagree with your conclusion that the agency was unreasonably lax in the manner and timeliness of its oversight of Clinton Memorial's efforts to correct alleged violations.

That conclusion necessarily revolves around whether our office appropriately used its resources. The report notes the workload of the Regulated Industries Unit regarding the several statutes it administers. However, the report also neglects to consider the implications of that fact and dismisses the other major enforcement cases in progress. Essentially, the report fails to recognize the legislative fiscal bureau recommendation from the time of adoption of the preneed statute, that the Unit be staffed with six FTEs to work in that area alone. Lean staffing automatically impacts the timeliness of all agency actions, a fact that was compounded due to the substantial time overlap and Securities Bureau allocation of resources to the Iowa Trust case.

There is no question that our work on the Clinton case was hurt by the lack of staff. Given the limited staff and resources, we were able to accomplish a great deal in this case. The report neglects to recognize improvements since that time. Towards the end of the Clinton case, a new assistant attorney general position was added, with a primary responsibility being to work on major preneed and cemetery cases. In January 1996 we hired a field auditor for the Unit. In 1995, we secured legislation that substantially bolstered the regulatory fund, to better enable us to address crisis situations. That same bill also contained a provision providing for extensive and clear liquidation powers. Legislation in 1996 added additional enforcement authority to allow the agency to seek recoveries for consumers by means of rescission, restitution, and disgorgement from law violators. The Unit has also adopted a very clear and consistent policy regarding release of enforcement orders to the media (part of your Recommendation #2).

The report twice mentions praise or admiration for the agency attempting a workout, with the ultimate goal of helping customers. Frankly, the message we receive from the report is that the safe course for the office is to take immediate licensing action against violators of statutes. The message becomes "don't exercise discretion and don't act in the public interest as a whole". The "easy" choice is for the agency to issue orders, step back, and watch what happens. The easy choice was to revoke permits, let local authorities pursue criminal prosecution, let the bank foreclose and a local receiver sort out the damage.

We also, respectfully, disagree with your assessment of certain facts, and conclusions drawn from some facts. These include the value of assets added during the workout. As more fully detailed in Mr. Britson's report, these exceeded \$200,000. Similarly, as long as the business stayed open during the course of the investigation and workout, every customer who had need and a contract with Clinton Memorial received the goods and services for which they contracted. The report also appears to denigrate the value of the credits received from the Clinton Memorial purchaser and others. The amount of consumer losses was not adjusted down for the free merchandise and services provided, but customers did not lose the money paid for these items. The Snell Zorning Funeral Homes have kept records documenting the delivery of 57 caskets and 81 vaults (free of charge) to date.

Some depictions of the "warnings" we received during the course of our oversight stand out more brightly in hindsight. Unlike the subjects of our enforcement actions, our office was prompt and responsive with the details you needed to complete your report. At that, it took more than four years in a static environment to make your determination. Realistically, no enforcement cases will ever be "perfect". The ongoing decision-making is like a game of chess or basketball. The overall focus must be on the "big picture", are we gaining ground or losing ground. There are always facts or "warning signs" that stand out in hindsight. That doesn't mean the decisions were wrong or unreasonable.

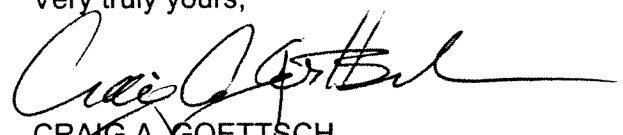
Your conclusions also reflect a disposition to give little or no credence to Mr. Britson's assessments. Indeed, the report contains numerous direct and indirect criticisms due to a lack of investigatory records by stating "it's unclear..." and "there are no records..." or that the Unit did not memorialize certain decisions or document thought processes. Memos to the file and case notes would have better enabled us to respond to the Ombudsman. Our recordkeeping was not as comprehensive as we would have preferred. The addition of staff has improved our ability to document casework. Mr. Britson and our office care deeply about our duties and charge to protect investors and consumers. In particular, Mr. Britson has long devoted energy, diligence, and extensive uncompensated overtime in the performance of his duties.

I am also extremely troubled by the tone of the report. The quotes from news accounts sensationalize the report and set an inflammatory backdrop to the findings. While the nature of your responsibilities call for attributing fault, I believe the findings and conclusions could have reached the same result without a pervasive negative style. From our meeting, I gleaned an understanding that you view your "customer" as the individual complainant. Frankly, to the extent you craft your report to resonate with that "individual" and thereby feel the need to include inflammatory statements, I believe the value of the report is diminished.

Lastly, your letter is addressed to Commissioner Vaughan. While the commissioner is the statutory administrator, I would be remiss to not point out that as Superintendent, I am the principal operations officer for this area. The investigation and agency actions reflect the decisions of myself and the director of the unit. Commissioner Lyons was kept informed of this major case. Commissioner Vaughan inherited the Clinton case subsequent to the investigation. To the extent that your report finds "fault", I take responsibility for that.

Did we perform perfectly? No. Could we perform better? Yes. Were our actions "unreasonable" or lax, or untimely? No. After you have time to digest our reply, we would be pleased to meet and discuss/ consult with you regarding your report.

Very truly yours,



CRAIG A. GOETTSCH
Superintendent of Securities

August 16, 1999

Mr. William P. Angrick II
Citizen's Aide/Ombudsman
215 East 7th Street
Des Moines, Iowa 50319-0231

Re: Clinton Memorial Park Cemetery & Funeral Home, Inc.
Ombudsman file number 94-83
Investigative Report 99-1
Agency Reply

Dear Mr. Angrick:

As previously indicated by the formal Notice of Intent to Reply, the Insurance Division does wish to reply to Investigative Report 99-1, and we do request inclusion of the Division's response in the published report. The time your office spent revising the Report in response to our comments is appreciated. We also appreciate the marked copy highlighting the revisions. The Division's reply is attached. We waive the remainder of the twenty-day response time.

Almost all of our revisions are (1) deletions or (2) changes necessitated by your revisions (revised page references and changes in quoted language in your Report, etc.). Your revisions allowed us to remove information regarding specific individuals and to greatly reduce the size of the exhibits. If you notice any information regarding individual customers that I missed, let me know and I will gladly do a revised draft. I didn't think you would need to know which language had been deleted, but if that is incorrect we would be happy to provide a marked copy upon your request.

A limited amount of language has been added. For your convenience, this language is highlighted in the attached Exhibit A. It is our belief that the added language introduces no new facts or arguments. Reviewing the draft after the passage of a few months, I feel the new language adds clarity to those sections of our response.

Sometimes, no matter what you try, or how hard you try, things still don't come out well. This aptly describes the Clinton Memorial case. It was not one of the Bureau's success stories. We truly regret the financial losses and emotional distress of Clinton Memorial's customers. We will proceed differently should we ever have a similar case in the future. However, that differs from a belief that our decisions were "unreasonable" or an "abuse of discretion" at the time they were made. We respectfully disagree with the Report's

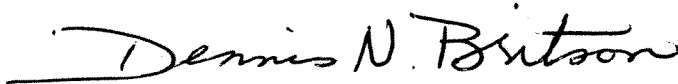
conclusions, the manner in which they were reached, and the way in which they are set forth.

We believe your Report identifies a rather strict legal standard for judging whether our actions were "unreasonable" or "an abuse of discretion" and then employs a different, lesser standard and methodology in reaching the conclusions set forth. Furthermore, in our eyes, your Report is not couched in the manner of an impartial fact-finder, but rather in the manner of a consumer advocate and critic.

We also believe that the Report employs hindsight in judging the wisdom of the Bureau's decisions. Hindsight does help in structuring forwarding-looking policies and practices. It should not be used in judging whether past decisions were reasonable at the time they were made.

My personal thanks for deleting the comments about the affidavits and for Mr. Burnham's comments during our meeting. Also, our thanks for providing us with an opportunity to express our concerns in person. Finally, we appreciate your offer to let us know when the Report is actually released. If you have any questions about our response, please do not hesitate to contact me. In my absence, please contact Craig Goettsch. Thank you.

Sincerely,



Dennis N. Britson, Director
Regulated Industries Unit

DNB:jr

Enclosures

cc: Therese Vaughan, Commissioner of Insurance
Craig Goettsch, Superintendent of Securities
Tamera Augustus, Investigator
Jeanie Kunkle Vaudt, Asst. Attorney General
Jeff Burnham, Asst. Citizen's Aide/Ombudsman
Ruth Cooperrider, Deputy and Chief Counsel

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EXHIBIT A

This exhibit sets forth additional language added to the response previously submitted to your office.

In Mr. Britson's response letter, amendments and additions were made to the CONCLUSION section on Page 9, as follows:

If the standard is whether our actions were "unreasonable" or amounted to an "abuse of discretion", the question isn't what you would have done in the same circumstances (based on all of the facts now known in hindsight). It is not appropriate for your office to substitute your judgment for ours, the agency charged with day-to-day regulation, in a case like this. The evidence was and is conflicting. Reasonable minds can disagree about the inferences to be drawn from much of the evidence and the decisions that needed to be made. Furthermore, the majority of the facts were in dispute or unclear during the time in question. Many facts are still unclear, uncertain, and subject to doubt.

Decisions made in the heat of an ongoing case should not be scrutinized for propriety under the perfect acuity of hindsight. The focus should have been: could a reasonable agency have performed as we did with the information and resources we had at the time ? We believe the answer to that question unequivocally is yes.

You are working from a cold and finite record. We had to make the difficult decisions at that time without the luxury of reflection. We are not saying that the Bureau's actions should be free of criticism. Although reasonable people might disagree on the actions that we took, our actions were not unreasonable and did not constitute an abuse of discretion.

In EXHIBIT TWO attached to Mr. Britson's response letter, a new paragraph was added in the response beginning on Page 3:

First, you need to distinguish between deposits in a trust account and compliance with Iowa Code chapter 523A, which was also satisfied by the purchase of chapel vaults and funding by insurance. You also must realize that money in the trust fund could be reallocated to other beneficiaries when the trusting no longer was required as the result of a chapel vault purchase, etc.



THOMAS J. VILSACK
GOVERNOR

SALLY J. PEDERSON
LT. GOVERNOR

Therese M. Vaughan, Commissioner

INSURANCE DIVISION
IOWA DEPARTMENT OF COMMERCE

August 23, 1999

Mr. William P. Angrick II
Citizen's Aide/Ombudsman
Capitol Complex
215 East 7th Street
Des Moines, Iowa 50319-0231

Re: Clinton Memorial Park & Cemetery & Funeral Home, Inc. (94-83)
Investigative Report 99-1

Dear Mr. Angrick:

INTRODUCTION

The key fact in the Clinton Memorial enforcement case was the small size of our staff in relation to our workload. After the timeframe of the workout, we increased our staff by adding a full-time auditor and an additional assistant attorney general. Nonetheless, our staff is still small in relation to our responsibilities and workload.

Our actions in the Clinton Memorial case were also restrained by our budget. We have since increased funding for the regulatory fund, which is used for enforcement and audit expenses. The availability of funds for travel involved with oversight activities should no longer be a limiting factor.

Regrettably, our agency will never be able to prevent consumer losses. However, that has always been our goal. The financial losses and emotional distress suffered by Clinton Memorial's customers were tragic. The Division was attempting, through the workout, to prevent the consumer losses that ultimately did occur as a result of the subsequent foreclosure. Although we did not have any prior workout situations, we did have prior cases involving receiverships and bankruptcies. In all of these cases consumers suffered major losses.

The decisions made were based upon facts available at that time. We knew that such things tend to move slowly, so we set deadlines to keep things moving. However, the deadlines were somewhat arbitrary. Each time a deadline was not met, the Unit looked to see whether the failure to meet the deadline was the result of unexpected delays, etc., or a failure to act by Clinton Memorial, etc. Further, we looked to see whether we felt it was still possible to meet the intended objective, albeit under a revised schedule.

The Clinton Memorial case was one of several priorities. However, we could not ignore our other large enforcement cases or our other regular duties. Our regular duties include registration, licensing and disclosure review, audit programs, and resolution of consumer complaints. We oversee multiple industries, including the preneed funeral industry, the cemetery industry, the business opportunity industry, the residential service contract industry, the motor vehicle service contract industry, and the retirement facilities industry.

The Regulated Industries Unit works diligently on every enforcement case that it has in addition to its regular duties. Progress on the Clinton Memorial case was often relatively slow, due to the complexity, the volume of the information, and the absence of certain information. Anticipated timelines would often change as events happened. These events were largely out of our control. We assume your office environment is similar. For example, we note your office's earlier intent to issue this report seven to eight months earlier, in May of 1998. —

During the workout (October of 1991 to July of 1994), with a staff of four to five people, the Unit regulated over 400 sellers of prearranged funerals, over 500 providers of motor vehicle service contracts, residential service contract companies, the sale of business opportunities, and continuing care retirement facilities. In addition to Clinton Memorial, our major enforcement cases within this time period included: (1) the Memory Gardens case (Iowa City); (2) the Leopard Enterprises case (Merle Hay Funeral Home and Mausoleum, Chapel Hill Cemetery, and Sunset Cemetery in Des Moines, and Shrine of Memories in Ottumwa) involving a receivership filing, bankruptcy, and criminal prosecutions; and (3) the Dubuque Memorial Gardens cemetery case (Dubuque) which included a receivership. Unfortunately, the Unit's ability to draw upon other resources in the Securities Bureau was limited by the Iowa Trust case, which was in progress during the Clinton Memorial case. The amount of work performed by the Superintendent of Securities, the enforcement staff of the Securities Bureau, and the sole attorney general assigned to the Bureau was extensive in the successful recovery of millions of dollars for Iowans.

There may be other cases where the virtual assurance of large consumer losses under any other course of action will cause us to consider a workout. The foreclosure in Clinton happened because the assets of the funeral home and cemetery were less than the amount of the outstanding loans and non-trusted consumer liabilities. That fact was equally true in 1991, 1992, and 1993.

We are not satisfied with the results of the Clinton Memorial enforcement case. The methods of oversight and monitoring did not work adequately. At each point where a decision needed to be made, the Unit gathered data. The Unit identified and discussed available options. The Bureau debated the pros and cons of each option, including

expectations of success in light of our prior experience in similar cases. The decision process included consideration of available staff and funding resources. As with any agency involved with enforcement, staff levels and funding resources were a major factor in our evaluation of the feasibility of some of the options under discussion. Our office is no different than a police force that cannot spend all of its time on a murder case (its top priority), but rather must still allocate resources for drug cases and even speeding enforcement.

It is important to remember that "timely" does not always mean "quick." Furthermore, any formal actions we took were subject to the Iowa Administrative Procedure Act. These administrative and legal systems had built-in time delays, for purposes of due process and fairness. It also took time, irrespective of our staff level, to acquire, compile, analyze, and evaluate a variety of information. A lot of information changed on a daily basis.

STANDARD OF REVIEW

I will highlight our understanding of the standards set forth in the Iowa Code, the administrative code, and case law.

Unreasonable, unfair, oppressive, or inconsistent with the general course of an agency's functioning.

The applicable standards appear to be **Iowa Code section 2C.11(2)** and **IAC 141-2.5(2)(2)**. Those provisions state that the office of the citizen's aide may investigate whether an **administrative action** might be **"Unreasonable, unfair, oppressive, or inconsistent with the general course of an agency's functioning, even though in accordance with law."**

IAC 141-2.5(2) further states that **"The citizen's aide/ombudsman may also inquire into an agency's policy, practice or procedure if the citizen's aide/ombudsman has reason to believe improvements can be made to the policy, practice or procedure which lessen the risk that objectionable administrative actions will occur."**

As defined in Iowa Code section 2C.1(1), **"administrative action"** means any policy or action taken by an agency or failure to act pursuant to law.

Preponderance of the evidence.

In making a determination, **IAC 141-2.11(3)** states that substantiation requires a determination based upon a **"preponderance of the evidence."**

Unreasonableness – an abuse of discretion.

The Division agrees that the issue is whether our actions were “**unreasonable**” or amounted to an “**abuse of discretion**.” It is our understanding that your office does not have any operations manual or written policies, guidelines, and procedures related to performance of investigations and development of investigative reports. As a result, and since your Report cited case law, we reviewed a number of Iowa Supreme Court cases in order to determine how these standards are applied.

An index and summary of these cases is attached as **EXHIBIT THREE**. It is clear from a review of these cases that actions are unreasonable or an abuse of discretion only in situations where an agency acts irrationally, clearly against reason, clearly against evidence, in a manner clearly untenable and clearly unreasonable. In other words, it takes a very high showing to judge agency action “unreasonable” or an “abuse of discretion.”

Thus, it is not surprising that the case review discovered only one case finding an abuse of discretion. Notably, the fact situation of that case is different from the case at hand, because the abuse involved an exclusion of evidence that prejudiced the party involved. See **Schoenfeld v. FDL Foods, Inc.**, 560 N.W. 2d 595 (Iowa 1997). The agency's action in that case was adjudicary in nature.

As noted by Mr. Burnham in our 1995 meeting, the term “unreasonable ...is ...a subjective term when you get down to it.” The question is not whether you agree with the actions we took. The question is whether the Bureau acted reasonably based upon the evidence that it had at the time of the decisions. The standards set forth above do not allow your office to substitute your judgment for those of the agency, especially in hindsight.

DISPOSITION BY OMBUDSMAN AFTER INVESTIGATION

Pursuant to **IAC 141-2.11(2C)**, your office may respond to an investigation in three ways, as follows:

Complaint unsubstantiated. If, after completing an investigation, the citizen's aide/ombudsman determines the complaint is unsubstantiated, based upon a preponderance of the evidence, the citizen's aide/ombudsman shall inform the complainant and the agency involved of such determination.

Complaint indeterminate. If, after completing an investigation, the citizen's aide/ombudsman is **unable to conclusively determine, based upon a preponderance of the evidence**, whether the complaint is substantiated or unsubstantiated, the citizen's aide/ombudsman shall inform the complainant and the agency involved of such conclusion. (Emphasis added.)

Complaint substantiated. If, after completing an investigation, the citizen's aide/ombudsman determines the complaint is substantiated, **based upon a preponderance of the evidence**, the citizen's aide/ombudsman shall inform the complainant and the agency involved of the findings of fact and conclusion. If appropriate, the citizen's aide/ombudsman shall also inform the agency of any recommendation that:

1. The matter be further considered by the agency;
2. The administrative action be modified or canceled;
3. A rule on which an administrative action is based be altered;
4. Reasons be given for an administrative action; or
5. Any other action be taken by the agency.

(Emphasis added.)

ISSUES

1. Is an administrative agency's failure to discover violations of statutory prohibitions, or the terms of an Order or Agreement issued by the agency, an "unreasonable" administrative action or an "abuse of discretion?"
2. Is the lack of formal administrative action for seven to eight months, during the course of an ongoing investigation and compliance agreement, an "unreasonable" administrative action or an "abuse of discretion?"
3. When an administrative agency does not have staff available for that purpose, is the agency's decision to hire an attorney to monitor a business that is the subject of an enforcement case and compliance agreement an "unreasonable" administrative action or an "abuse of discretion?"
4. When an agency hires an attorney to monitor a business and compliance agreement because the agency did not have staff available for that purpose, is the agency's reliance upon that attorney and the agency's failure to conduct separate monitoring of the business (other than monitoring the progress of a "workout") by agency employees an "unreasonable" administrative action or an "abuse of discretion?"
5. When an agency sets goals and time limits for a business to work its way out of statutory non-compliance gradually over time, is an agency's decision to change those goals and time limits (without changing the requirements necessary to reach full compliance) an "unreasonable" administrative action or an "abuse of discretion?"

RESPONSE TO RECOMMENDATIONS

Enforcement cases often identify refinements that might be made in our regulatory systems. The Division constantly evaluates its regulatory procedures. We learn from every case we handle. We have probably learned more from our unsuccessful case in Clinton than we have from all of our other cases. We have already implemented changes in staffing, budgetary resources, and statutory provisions.

RECOMMENDATION:

1. **Adopt and implement a policy under the principle that the Unit should do everything reasonably possible to ensure that "work outs" do not increase the number of consumer "victims".**

RESPONSE:

That has always been our policy. Mr. Bribiesco was hired with that goal in mind. We agree with that principle. We have also concluded, as a result of the Clinton Memorial case, that workouts should only be done in situations where close supervision can be provided. While we aren't aware of any way to structure "workouts" that would ensure that additional consumer losses would not occur, hands-on supervision that tracks what happens to consumer funds could be expected to reduce the likelihood that additional consumers would suffer losses. We have used this approach in our oversight of Black Hawk County Garden of Memories. It is, however, extraordinarily time-consuming.

RECOMMENDATION:

2. **Regarding suspensions of establishment permits, devise a method to verify whether an establishment has violated the suspension or make reasonable efforts to notify consumers and potential consumers of the establishment so they are fully informed.**

RESPONSE:

The issue of monitoring compliance, regarding suspensions and prohibitions, is a difficult one. The Bureau issues numerous orders and prohibitions. We would never have adequate staff to monitor compliance. As staff resources allow, the Bureau tests compliance in some cases, but periodic testing is the best in all cases that could ever be hoped for.

In regard to notifying consumers, we share this concern. The only feasible method is to release statements to the media when the Unit takes administrative action. The Unit has adopted a Media Policy under which press releases will be mailed to the local media of the area in which the business is located when the Unit issues the following types of orders:

1. Notice of Hearing regarding trust or warehousing violations, fraud, or misrepresentations.
2. Cease and Desist Orders.
3. Final Decisions.

Copies of these orders are mailed to members of the public upon request.

DISCUSSION AND ANALYSIS OF THE BUREAU'S ACTIVITIES

Our responses to specific statements made in the Report that we dispute as a factual matter are entitled "**DISPUTED FACTS AND STATEMENTS**" and have been attached as **EXHIBIT ONE**. Our additional **RESPONSES TO SPECIFIC COMMENTS IN THE REPORT** have been attached as **EXHIBIT TWO**. The following is meant to be a more general response to the Report and discussion of your allegations.

The Workout Decision

Consumers usually do not fare well in situations where the business has a foreclosure, bankruptcy, etc. We reasonably believed that, with the large client base, the level of business involved at the funeral home and cemetery and the large spread between the retail and wholesale prices of funeral and cemetery merchandise, rehabilitation was possible. First Midwest Bank reviewed the available information and provided an additional \$50,000 of financing solely to improve the trust situation. If Clinton Memorial had remained open as a going concern, consumers would have received what they paid for. From October of 1991 to July of 1994, Clinton Memorial's customers received all of the goods and services that they had paid for. The concept we employed is similar to the rehabilitation of an insolvent insurance company. See Iowa Code Chapter 507C.

Decision to Install Operations Manager Instead of a Court-appointed Receivership

We appointed Mr. Bribriesco because we did not have the resources to do any significant oversight. The small size of our staff, our limited financial resources, and the number and size of active cases limited our ability to supervise the workout at Clinton Memorial. Bankruptcy courts routinely use attorneys as bankruptcy trustees to run insolvent businesses. A Des Moines attorney, Tom Flynn, was appointed as a bankruptcy trustee in the Leopard Enterprises case after it filed for bankruptcy. To the best of our knowledge, Mr. Flynn had no former experience with funeral homes or cemeteries.

Our main reasons for installing Mr. Bribriesco as the Operations Manager, instead of a court-ordered receivership, were:

- The apparent lack of knowing violations, or, stated differently, our assessment that, at least early on, we would not be able to prove knowing violations (there was substantial dispute between the prior owner and Mr. Gailbreath over the reasons for the trusting and warehousing problems; indeed there was a civil law suit regarding these issues);
- The Bureau's inability to finance and oversee a lengthy receivership of an operating business of that size, with both a funeral home and a cemetery;
- The Bureau's assessment that a receivership would be difficult to attain and would involve a protracted, contested legal process;

- The Bureau's assessment that delivery of services and merchandise over time in combination with the purchase/warehousing of merchandise at wholesale costs had a reasonable chance of preventing a financial collapse; and
- The Bureau's assessment that even filing for a receivership (with no early certainty of success) would lead to a "run on the bank" scenario with consumers definitely losing out.

Monitoring Mr. Bribriesco and Clinton Memorial

We were indeed monitoring the progress of the workout. We were relying upon Mr. Bribriesco to conduct oversight of Clinton Memorial. If we had the resources to engage in the oversight you suggest, we wouldn't have needed to hire Mr. Bribriesco.

Discovery of Unlicensed Sales

Your Report suggests that a government agency's failure to discover violations by its licensees is an **abuse of discretion** and an **unreasonable** action. We disagree. All but two of the sales mentioned in the Report were directly in violation of the Bureau's Orders.

CONCLUSION

We note the negative implication created by statements indicating that the Division is unable to recall events that happened during this case. We think it is sufficient response to note that these events took place between four to eight years ago. Even after hours spent reviewing documents, it is hard to remember what we did or did not do and why. That is the public policy behind statutes of limitation.

If the standard is whether our actions were "unreasonable" or amounted to an "abuse of discretion", the question isn't what you would have done in the same circumstances (based on all of the facts now known in hindsight). It is not appropriate for your office to substitute your judgment for ours, the agency charged with day-to-day regulation, in a case like this. The evidence was and is conflicting. Reasonable minds can disagree about the inferences to be drawn from much of the evidence and the decisions that needed to be made. Furthermore, the majority of the facts were in dispute or unclear during the time in question. Many facts are still unclear, uncertain, and subject to doubt.

Decisions made in the heat of an ongoing case should not be scrutinized for propriety under the perfect acuity of hindsight. The focus should have been: could a reasonable agency have performed as we did with the information and resources we had at the time? We believe the answer to that question unequivocally is yes.

You are working from a cold and finite record. We had to make the difficult decisions at that time without the luxury of reflection. We are not saying that the Bureau's actions should be free of criticism. Although reasonable people might disagree on the actions that we took, our actions were not unreasonable and did not constitute an abuse of discretion.

Sincerely,

A handwritten signature in cursive script that reads "Dennis N. Britson". To the right of the name, there are some initials or a small mark that appear to be "by CAG".

Dennis N. Britson, Director
Regulated Industries Unit

RESPONSE TO COMMENTS MADE IN THE REPORT

APPEARANCE OF NEGATIVE BIAS

We hope that your office did not reach a judgment before you even contacted our office the first time, based largely on newspaper statements and opinions. We hope that your office does not currently treat these newspaper articles as if they were adjudicated facts. Thus, we are confused that your Report continues to elevate these newspaper statements to that level. Obviously, you must be aware that they contain highly negative comments regarding the Division. You must also be aware of their sensational content. We are concerned that your Report appears to exhibit a negative bias in other ways as well.

The mere fact that Allegation #2 was raised and pursued appears to show a negative bias or desire to sensationalize or discredit. An initial review within your office should have been able to answer that allegation. You have agreed that "Nothing in state law or administrative rule would have required the Unit to communicate with Clinton Memorial's customers during that period." On February 7, 1995, Assistant Ombudsman Jeff Burnham stated

"... that was one of the two allegations that we broke down, ... that the Division was not timely in notification of customers. And your letter was very insightful into the reasons, what went into the August 1 letter and why you sent it out and you asked though, at one point, whether our office is aware of any state agency that ... engages in sending out notices.... We're not currently aware of anything. I talked it over with Bill Angrick, our Director, actually just a few minutes ago, and he suggested that's something I might look into to see if there is."

Having raised the issue, we can understand the need to address it. However, that doesn't explain why your Report still devotes half a page to sensational and negative statements made in newspapers. For example, the statement of opinion that "the investigators" [the employees of the Insurance Division] are "as guilty as Gailbreath and Bribiesco. They could have stopped this fraud three years ago and didn't..." isn't even relevant to the issue of whether the Division should have provided individual notice to consumers.

STATEMENT (Page 5 – Footnote 5)

Gailbreath cancelled those policies in December 1989. Steffen sued Gailbreath for the \$200,000 promissory note. A jury awarded Steffen a \$200,000 judgment, according to articles in the *Clinton Herald* and *DeWitt Observer* newspapers. - It is unclear whether such an agreement would violate the trusting requirements of Chapter 523A.

RESPONSE

The "proceeds" of life insurance policies are paid upon the individual(s)' death. Trusting requirements no longer exist after performance and the related delivery of merchandise and services.

STATEMENT (Page 11 - Footnote 15)

The document showed Clinton Memorial Park Cemetery had a net operating loss (before taxes) of \$615,237.20 for the 11-month period ending May 31, 1992.

RESPONSE

This figure lacks apparent relevance unless presented for the purpose of discrediting the concept that Clinton Memorial had a chance of becoming a viable business. Therefore, we note that the 11-month statement had expenses of \$907,757.08 versus \$327,200 in the proposed budget and contained a write-off of \$303,795.24 in bad debt expenses.

STATEMENTS

(Page 12)

On March 17, 1993, the Unit received Clinton Memorial's annual report for 1992. It showed Clinton Memorial, during 1992, received \$176,907 for pre-need contracts sold in previous years, *but had deposited none of those monies in trust*. [Britson claimed the Unit did not receive that report until November 1993, but it is date-stamped as being received March 17, 1993.]

(Page 25)

Less than three months after fully reinstating the establishment permit, the Unit received Clinton Memorial's annual report for 1992. The cover page – stamped as being received on March 17, 1993 – shows Clinton Memorial in 1992 received about \$177,000 for preneed contracts sold in previous years, *but had trusted none of those monies*.

This was a significant "warning sign." And Britson agreed with that assessment. He wrote the 1992 annual report "reflected new sales and installment payments, but no new trusting." He indicated the report triggered the December 1993 audit which found the problems were even more extensive.

Trouble was, the Unit did not act on this sign for about eight months. Why? Britson claimed Clinton Memorial did not submit this particular document on time:

Clinton Memorial finally sent us a 1992 report in late November of 1993 (there was no date stamp on the report).

But the copy he provided to the Ombudsman has a date stamp showing it was received by the Securities Bureau on March 17, 1993.

It is unclear why the Unit failed to respond to that annual report immediately and why Britson claimed it was not submitted until eight months later. Whatever the reasons, the Unit's failure to respond gave Clinton Memorial another eight months to misappropriate pre-need income and merchandise.

RESPONSE

First, you need to distinguish between deposits in a trust account and compliance with Iowa Code chapter 523A, which was also satisfied by the purchase of chapel vaults and funding by insurance. You also must realize that money in the trust fund could be reallocated to other beneficiaries when the trusting no longer was required as the result of a chapel vault purchase, etc.

Second, I think we were confusing two different reports. We also received a report in October of 1993. Our recollection regarding the annual report does appear inaccurate, upon a review of the materials. It does appear that we received the Annual Report earlier than remembered. However, for an unknown reason, we also have a copy of the report's cover-page that is not date-stamped. We may have received an incomplete filing that was supplemented in March of 1993. See **EXHIBIT FOUR**.

The Annual Report was date-stamped March 17, 1993. I note that marks appear to have been placed next to 1992 sales. I further note that we appear to have started to act upon specific concerns on the following day. Meg Winslow Maffitt, a Securities Bureau enforcement attorney, sent a letter, dated March 18, 1993. See **EXHIBIT FOUR**. The second paragraph stated:

We have finally received the 1992 Annual Report for Memory Gardens in Iowa City. Clinton Memorial should not have made any preneed sales in 1992. If sales **were** made, however, failure to report those sales will greatly complicate the resolution of all pending matters. If any sales subject to Iowa Code 523A or 523E were made by Clinton Memorial in 1992, report those sales immediately.

In your ten-page letter, dated December 9, 1996, question number 21 asked the following question:

Concerning Ms. Winslow Maffitt's March 18, 1993 letter to Mr. Gailbreath, was a response ever received to items 2-4? If so, please explain what the response was. If not, what action (if any) did the division take as a result?

In our letter of response, dated April 18, 1997, regarding item 2, we said:

Clinton Memorial finally sent us a 1992 report in late November of 1993 (there was no date stamp on the report). This report was the main reason for the December 1993 audit. The report reflected new sales and installment payments, but no new trusting. The dates on the report and check are March 1993, but the report was not sent at that time.

We believe we were referencing the October 12, 1993, report filed by Bribriesco that included updated information similar to the exhibits in the 1992 annual report. The attachments are not date-stamped.

Given our small staff and heavy workload, it has not been our policy to maintain records of historical events. As a result, we are unable to create a chronological summary of our activities during that seven- to eight-month time period. We do not keep records of telephone contacts. The Bureau does not keep log entries and, given the passage of this much time, we have limited recall of the events that took place during this time. Our records include a May 5, 1993, letter from Mr. Britson to Mr. Bribriesco which mentions a "meeting last Monday." From a review of Mr. Britson's travel voucher forms, we have also been able to determine that Mr. Britson met with Mr. Bribriesco in Bettendorf on September 14, 1993.

STATEMENT (Page 18)

Those losses were potentially reduced through credits offered by the new owner and insurance claims.

RESPONSE

Other local funeral homes offered similar credits. To date, the Snell-Zornig Funeral Homes have provided 57 caskets and 81 vaults, free of charge, to former Clinton Memorial customers.

STATEMENT (Page 18)

Britson indicated there were no signs of problems – stating in part, "we didn't have anything indicating a problem but the problems were occurring." The record indicates otherwise.

RESPONSE

First, it has been a long time since 1995 and I don't remember the context, i.e. which "problems" were being discussed in that conversation. Second, the fact that deposits were not being made into trust is only the first step in the analytical process. The next step is looking to see whether there is another method of compliance for the sales in question, such as warehousing or insurance. Then, you must segregate and identify

the amount for the individuals not covered by warehousing or insurance. This process was complicated by the ongoing calculation of who was or was not covered by insurance funding. Clinton Memorial did not utilize bonding. It takes time and calculations once you note the "warning signs" in order to determine whether there truly is a problem regarding a lack of trusting for payments not covered by warehousing or insurance funding. This is one of the areas where Clinton Memorial's failure to identify the specific owners of warehoused merchandise created a problem.

It is our recollection that we were not able to document willful, intentional violations by Clinton Memorial until late in 1993. That audit would have been precipitated by concerns we had ("warning signs") and preceded by action to develop specific information needed to conduct an effective audit. Given the complex situation with voluminous transactions involved, that fact development takes a great deal of time. It can and often does take months.

The Division does not keep diaries of its daily activities. We do not recall these events with any precision, because they took place years ago. In our April 18, 1997, letter, we stated the following:

Our concern was the possibility that Clinton Memorial was not making trust deposits as required by law. In other words, they knew or should have known that their actions were violations of the statutory requirements. In the Merle Hay case, they calculated the amount that should have been trusted and actually wrote checks, which were held in a drawer undeposited. They knew what the law required and just didn't do it (for financial reasons). The violations discovered at Merle Hay weren't in any gray area or didn't involve a technical mistake caused by a misunderstanding of the legal requirements. Our concern was the possibility that Clinton Memorial was engaged in statutory violations and knew that what they were doing was illegal.

We received some evidence that 80% of incoming 523A payments and 50% of incoming 523E payments were not being deposited as required by law. We asked for information regarding sales made since the license was reinstated. We received a fax regarding funeral sales that showed a "current" liability, which concerned us. Trusting should occur each month as payments are received.

The Cease and Desist Order dated July 3, 1991, which was an order against further trusting violations. This prohibition, which obviously exists in the statutes as well, was included in each of the Bureau's Orders and Agreements. The audit of December of 1993 confirmed that Clinton Memorial was not trusting 80%/50% of incoming payments received pursuant to preneed contracts. No trusting was being done until payment in full was received, instead of trusting as payments came in. In addition, in some months they waited to make a trust payment even on a fully paid contract.

We have located a facsimile from another Clinton funeral home that appears to be part of our fact gathering. We received the facsimile November 24, 1993.

STATEMENT (Page 20)

The fact that it was willing to violate a direct order by the regulatory agency should have raised legitimate questions, at that time, about Clinton Memorial's capacity to resolve the trusting shortages. At a minimum, those unlicensed sales *demand*ed that the Unit document them in a letter putting Clinton Memorial on notice that any further unlicensed sales would be unacceptable.

But nothing in the record suggests the Unit was even aware of those unlicensed sales when it initiated the "work out" effort through the October 14, 1991 order. That order detailed the Unit's findings concerning four statutory violations, but did not mention the fact that Clinton Memorial had also been making unlicensed sales.

Asked when the Unit became aware of the unlicensed sales, Britson said there is no record and he no longer recalls.

As a result, it appears the Unit initiated the "work out" without determining whether Clinton Memorial had complied with the previous order - and without holding Clinton Memorial accountable for violating it.

RESPONSE

The Report condemns the Division for the failure to act on four unlicensed sales that occurred prior to the workout, even though it notes that "nothing in the record suggests the Unit was even aware of those unlicensed sales when it initiated the 'work out' effort through the October 14, 1991 order." We are condemned *in hindsight* for a failure to act upon information that you concluded was probably unknown. We did not know about the unlicensed sales at the time in question.

It is also unclear what the Division could have done to prove that a violation had not occurred. Why would an agency, in the absence of knowledge of a violation, undergo an extensive effort to look for evidence of unlicensed sales?

We likewise do not understand why we are being criticized for not holding Clinton Memorial accountable for a violation that wasn't known to us at that time. Your analysis seems inconsistent.

STATEMENT (Page 21)

Similarly, the income statement for the 11-month period ending May 31, 1992 shows Clinton Memorial received \$9,538.30 in connection with sales of pre-need "markers and bases." Given that income, it is unclear why no funds were in the "marker trust" as of May 1, 1992.

RESPONSE

We agree that it was unclear at the time, like most other facts in this case, and that it required further investigation to ascertain the relevant facts. First, the trusting requirements did not exist prior to July 1, 1990, and many contracts involved installment payments taking place over many years. Second, the trusting requirement, even for sales made after July 1, 1990, does not exist in situations where the marker will be set on the gravesite within twelve months. Third, most marker manufacturers have storage programs where the marker is stored. Storage is an alternative to the trusting requirements. The Division noted this possible violation and worked to document the violation and determine the specific amount of the trusting deficit for these items. Given the many years that have passed, we cannot recall details. There was a trusting shortage.

STATEMENT (Page 22)

It is unclear how the Unit, without conducting an audit at that time, could have concluded Clinton Memorial's cash flow was not sufficient to resolve the shortages in a "reasonable time period."

RESPONSE

Our opinion regarding their future cash flow was based upon experience and information available at the time. It is unclear how we would have been able to "audit" future cash flow. If you are referencing an audit of trusting liabilities and deficits, we did have estimates of what we considered to be the trust deficit(s) as of that point in time.

STATEMENT (Page 22)

As long as Clinton Memorial had significant statutory shortages, First Midwest had a clear motive for continuing the "work out" effort - it stood to lose money on the mortgage. (As it turned, First Midwest lost an undisclosed amount of money on the first mortgage, according to Britson.)

As a result, the Unit should not have been relying on the first mortgagor's analysis in determining the feasibility of the "work out".

RESPONSE

In this instance, your office is substituting your judgment for that of our office and First Midwest Bank. Trust assets are not subject to mortgages. The loan proceeds were turned into trust assets when chapel vaults were purchased, insurance was purchased, deposits were made into trust, etc. First Midwest Bank did not benefit from a delay in foreclosing on its mortgage and lost additional sums from the amount loaned pursuant to the workout. The fact that First Midwest Bank had a large amount of funds at risk

clearly explains why it was willing to consider an additional loan, but it is illogical to assume that they would have placed a significant, additional sum at risk without first coming to a conclusion that the workout had a chance of success.

STATEMENT (Pages 23 & 24)

The general lack of significant progress in the first 14 months of the “work out” *demand*ed that the Unit, before allowing the “work out” to continue, determine what Clinton Memorial had been doing with pre-need income received over that time.

Instead, the Unit appointed a third-party attorney as operations manager and allowed him to try to determine the amount of the statutory shortages. Since more than two years had elapsed and the Unit had not been able to determine the exact shortage, it is unclear why anyone would believe that Bribriesco - with little or no experience in the pre-need funeral industry - could do so more quickly than the Unit (and accurately).

RESPONSE

The records that needed to be reviewed and analyzed were in Clinton and there were a lot of them. New financial transactions took place weekly, if not daily. We believed and continue to believe that local oversight was necessary for efficient resolution of the problem at that time. Furthermore, the Division did not have staff available to send to Clinton. Even if we did have someone available for such an extended time period, the travel time between Des Moines and Clinton takes hours each way. One out of five workdays would have been spent traveling.

Just as we helped your office develop a reasonable, if not complete, understanding of the industry and applicable regulations, we provided similar information to Mr. Bribriesco. Clearly, your office wants to substitute its judgment for ours. We did take an action, but you disagree with the choice (appointment of Mr. Bribriesco as operations manager) we made from among the available options.

Finally, the issue of oversight was not concerned with calculating the deficit. The issue of oversight regarded ongoing compliance and progress in steps to reduce non-compliance—which was analyzed and determined individual by individual. The workout would have been done when compliance was in place for every Clinton Memorial consumer.

STATEMENT (Page 24)

And while the loan would give Clinton Memorial a temporary cash flow “shot in the arm,” it would have to be paid back, reducing the amount of other income available to resolve its shortages – which was critical, since the loan proceeds were not nearly sufficient to resolve the shortages.

RESPONSE

We concluded that there was a reasonable chance that Clinton Memorial could cover its operating expenses. If they could at least break even, the delivery of services and merchandise over time would gradually reduce the trust obligations and, eventually, allow the facility to engage in serious debt reduction or a sale of the facility under terms that would honor consumer contracts.

Yes, loans do need to be paid back. However, the loan didn't create "temporary cash flow," because monthly installment payments would continue to come in for merchandise that had been warehoused. After the merchandise was warehoused, the payments would not be subject to the 80% trusting requirement.

For example, assume a wholesale purchase cost of \$550 and a retail sales price of \$1,895 for chapel vaults. If 90 chapel vaults were purchased (\$49,500), the facility would then be able to use the applicable installment payments of \$170,550, plus interest on installment payments, they received on these contracts. This example should explain the initial focus on purchasing and warehousing chapel vaults.

STATEMENT (Page 27)

Considering the fact that Clinton Memorial during that time had been unable to buy and warehouse even just one eternal rest bed – wholesale cost of \$189 – it's unclear why anyone would reasonably believe it could make up a deficit of \$250,000 or more.

RESPONSE

The initial focus was on buying chapel vaults, not rest beds. Also, we believe the numbers actually achieved by the end of the workout make this belief look reasonable:

Eternal Rest Beds:	\$ 36,260.00	See Note 1.
Life Insurance Purchased April 1993:	\$ 60,987.00	See Note 2.
Chapel Vaults:	\$124,417.10	See Note 3.
Markers Delivered		
Sold By Predecessor (12)	\$ 7,255.02	
Markers Delivered in 1993 (10)	\$ 9,851.20	

TOTAL: \$238,770.32

Note 1. This number was calculated by multiplying the 28 units purchased by a retail price of \$1,295. The Report agrees with this calculation on Page 30.

Note 2. The Report agrees with this amount on Page 30.

Note 3. This amount assumes the 92 chapel vaults actually in inventory at the time of the bank foreclosure, with only 37 interiors. This amount also assumes that 25 of these vaults were from the initial inventory warehoused by Wisconsin Vault and Casket Company. This number was calculated by 1) multiplying 23

complete chapel vaults by a retail price of \$2,195, 2) multiplying 55 chapel vault exteriors by a retail value of \$1,344.22, and 3) adding the totals.

These amounts do not include the value of merchandise and services provided pursuant to pre-need contracts honored by Clinton Memorial between 1991 and 1994.

STATEMENT (Page 28)

Table entitled "Pre-need cash receipts received and required to be trusted during "work out"

RESPONSE

We have recalculated the amounts set forth in the table. We are unable to explain the difference in areas where the numbers differ, since you did not provide your calculations.

Pre-need cash receipts received and required to be trusted during the workout

TYPE OF SALE	Pre-need cash receipts During "work out"	Insurance Funded	Percent to be trusted by law	Amount to be trusted by law
Chapter 523A Sales	\$245,829.83	\$22,130.02	80 percent	\$178,959.85
Chapter 523E Sales	\$25,073.11	\$0.00	50 percent	\$12,536.55
New Sales: Chapter 523A	\$30,025.29	\$0.00	undetermined	\$15,012.65 (minimum)
TOTAL	\$300,928.23	\$22,130.02	NA	\$206,509.05

STATEMENT (Page 29)

Table entitled Value of assets actually added during "work out"

RESPONSE

We have recalculated the amounts set forth in the table. We are unable to explain the difference in areas where the numbers differ, since you did not provide your calculations.

Value of assets actually added during the "workout"

Product	Number of units added	Value of units added
Eternal Rest Beds	28	\$36,260.00
Life Insurance		\$60,987.00
Chapel Vaults	78 (55 w/o interiors)	\$124,417.10
Markers Sold by Predecessor	12	\$7,255.02
TOTAL		\$228,919.12

STATEMENT (Page 31 – Footnote 28)

The Unit has had a six-person staff since January 1996. Britson wrote that he believes the Unit has "an adequate staff at this time for our anticipated workload."

RESPONSE

We could use more staff. The Regulated Industries Unit regulates pre-need funerals, cemeteries, residential service contracts, motor vehicle service contracts, business opportunities, and retirement facilities. We are stretched to the limit, but we get our essential duties done.

Although we always have a heavy workload, the workload at the time in question was the highest ever encountered, and we do not anticipate ever having a similar workload. As noted below we had two (three if you separate Memory Gardens in Iowa City) additional enforcement cases of this magnitude, in addition to our regular duties. This large number of ongoing, large enforcement cases is unlikely to occur in the future. Furthermore, a large portion of the trusting problems built up in the decades before state oversight and regulation of these activities began in 1987. Finally, the Iowa Trust case activities greatly reduced the Bureau's ability to assist with the Unit's activities. The Securities Bureau added a second assistant attorney general in 1994 to assist with the Unit's enforcement activities. We have also added an auditor.

- The Leopard Enterprises case, an even larger situation than Clinton Memorial, involving consumer losses in excess of six million dollars and properties in Des Moines, Urbandale, Ottumwa, and Fairfield, which reached a crisis point late in 1991 and early 1992, was not resolved until late in 1992.
- The Unit discovered problems at Dubuque Memorial Gardens in 1992. This case reached a crisis point in 1992 and 1993. The cemetery was abandoned and a receivership was established in June of 1993.
- The Iowa Trust case was discovered in December of 1991. David J. Lyons, former Commissioner of Insurance was appointed Receiver for the Iowa Trust. The amount of work performed by the Superintendent of Securities, the enforcement staff of the Securities Bureau, and the sole attorney general assigned to the Bureau was extensive in the successful recovery of the millions of dollars of stolen funds.

STATEMENT (Page 32)

However, if there is a lesson to be learned from the Clinton Memorial experience, it is that the Unit should not undertake any similar "work out" efforts unless it can proactively look for warning signs. As this experience showed, a "work out" carries the risk that aggregate consumer losses can actually grow. Unless the Unit can ensure that won't happen, it is not a risk worth taking.

RESPONSE

There are lessons to learn. We hope that the biggest lesson to be learned isn't that state agencies need to be worried about creating documentary "cover" to prove that they were diligently working on a case, in the event of investigations by your office. We have done our best to provide the documentation and recollection of events that your office has requested.

The Division does not intend to engage in future workouts comparable to the one attempted at Clinton Memorial, because we would not have adequate personnel and resources to engage in close supervision. The most important lesson, in hindsight, is that it is probably impossible to monitor an operation of that size on an ongoing basis. Thus, the structure of any workout would need to control payments and deposits. We said the following about a more recent enforcement case, in a February 14, 1997, letter to your office:

This case has taken a large amount of the Regulated Industries Unit's time and effort. We have finished our audit and initial investigation (although it technically remains open until the file is closed), but the oversight activities continue to take a large amount of our time.

In order to attempt to safeguard and account for consumer funds the Bureau is currently processing all consumer payments (123 so far this month). This requires opening the envelopes, separating and recording checks and money orders from the payment cards, photocopying and then returning payment cards to the cemetery, photocopying the checks and sending a copy to the cemetery, totaling checks and making deposits in an escrow account and creating records in our files. It also means processing the cemetery's requests for withdrawals of not-trust (sic) funds from the escrow account. See the attached lists and spreadsheets for an indication of the time and effort involved. Please be advised that the names and amount are part of a confidential investigation file.

We saw many warning signs over the years, but being able to observe warning signs isn't enough. It can take too long to discover violations or sort out the facts. Furthermore, it isn't a question of "aggregate" gains or losses. Any losses are unacceptable, even if other consumers gain. The payments must be controlled at the

entry point to assure that they are not misspent. All consumer payments would need to be sent to the Division or an independent agent/receiver who would segregate and deposit the trustable funds appropriately.

STATEMENT (Page 32)

Further, if the Unit finds itself in a situation of needing to audit a particular establishment but its staff doesn't have the time, there is another option. Arrange for a third-party audit by a certified public accountant at the expense of the establishment, pursuant to Code section 523A.2(5).

When the Ombudsman asked Britson about this option, he noted such an audit would be relatively expensive and would reduce the amount of money available to consumers. While it's laudable to take such a position, the Clinton Memorial experience shows there are times when an audit - even an expensive one - would be easier on consumers than no audit at all.

RESPONSE

The implication that trust deficits were not being calculated at that time ("no audit at all") is inaccurate. A calculation of trust liabilities and assets was being conducted by Mr. Bribiesco and the Division. A CPA audit of this type takes thousands of dollars. Your statement does not appear to dispute the cost.

Knowing in hindsight that there were violations that would have been found, it would have benefited consumers. That's hard to argue, and we agree that CPA audits would be the answer in some situations. In fact, our February 14, 1997, letter to your office indicated our use of a CPA audit in a more recent enforcement case.

The issue is the validity of the decision that was made at the time, based upon available information. Furthermore, the statement seems to confuse two issues, oversight of ongoing activities (which an audit doesn't do) and the calculation of the amount of the trust liabilities and the corresponding compliance or noncompliance, as of specific dates.

It is important to note that this was not a static, unchanging trusting deficit. The process is much more progressive in nature. Adjustments were made constantly as additional information was acquired and as consumers made additional payments. Adjustments were also made as Clinton Memorial delivered merchandise and services at the time of individuals' deaths. As an aside regarding the calculation of the trusting deficits, it should be noted that the calculations of the trust shortages (for our purposes) were usually stated in terms of the number of items purchased (vaults, rest beds, and chapel vaults).

In cases such as this, you begin with rough estimates. The first step is usually a rough numerical count of merchandise and services sold in comparison with the existing trust

assets. That type of calculation can often serve to identify the fact that a shortage exists, but it doesn't determine how much.

The next step is a more detailed, preliminary estimate based upon a file-by-file search of contract information and payment records. Then you adjust and refine the figures to come up with more precise numbers, the final steps. However, even in that final step, the numbers continue to change as the business continues to operate.

We would emphasize that this process is incremental in nature. Individual files are reviewed - one at a time by a member of our staff (permanent or temporary). If the number changes for that particular file, the number for the trusting deficit changes (e.g., a consumer might make a \$25.00 payment once each month, etc.). Some files end up being reviewed many times during an audit process. Furthermore, if the Bureau reviews the purchases of ten individuals in one day, the trusting deficit may change as many as ten times in that one day, etc.

The Division did an initial calculation of the trust fund shortages, based upon information acquired during on-site audits and in our office. We received information from Clinton Memorial and Mr. Bribriesco by mail and facsimile. During the time in question, Mr. Bribriesco was working with a foundation of information that we had already put together and provided as a reference.

Mr. Gailbreath claimed that the facility could provide additional information we did not have which would significantly reduce our estimate of the trusting deficits. He stated a belief that, in our calculations, we had not deducted amounts related to many deceased individuals, for whom Clinton Memorial had already delivered merchandise and services. He also stated a belief that we had not reduced the Chapter 523E liability for many contracts where the marker had already been set/installed on the grave by Clinton Memorial. If there isn't a note in the file saying a marker has been set, we assume that it has not been set. We were working to reach mutual agreement on the amount of the shortages.

We note Mr. Bribriesco's February 17, 1993, letter which stated:

...First of all, thank you for sending me all of the data that was gathered in the audit that was conducted by the State. It has been very helpful, and it has allowed us to run a cross check on all of the data that we have prepared through our own audit. At the present time, we are going through all of the data sheets that you sent, which total approximately 45 single space data sheets that extend out for each client approximately six sheets. We are going through each of the entries on your data sheets and we are comparing them both with the file on that client and with the reports that we have produced out of our computer. As it turns out, some updating has been necessary for some of the accounts.

The Division created a computer database, with a record for each individual customer: name, address, items purchased, purchase amounts, trust amounts, etc. The database was updated and corrected every time we received new or different information. During the period in late 1992 and early 1993, we mostly worked to compare and verify information provided by Mr. Bribriesco. For example, we telephoned people who signed permission slips to confirm their signature. We were also going beyond the initial issues of insurance conversion and the chapel vault warehousing and looking at issues like the sale of concrete vaults. This was a time consuming process.

STATEMENT (Page 33)

In a January 27, 1995 letter to the Ombudsman, Britson wrote:

Despite the advantage of hindsight, in discussing this with the Superintendent [of Securities] and others involved in the case, we remain absolutely convinced that our choices and decisions were the best and most sound, based upon the situation's facts, our extensive experience with previous preneed and securities cases, and what the statute allowed us to do.

... The administrative order file alone shows a series of orders and agreements. Even of (sic) surface review of the order file should indicate that the [Insurance] Division was treating the situation as a serious case and was engaged in a continuous pattern of oversight.

RESPONSE

The issue is the Securities Bureau's decision-making process. The Bureau gathered available data. The Bureau identified and discussed available options. The Bureau debated the pros and cons of each option, including expectations of success in light of our prior experience in similar cases. The decision process included consideration of available staff and funding resources. As with any agency involved in enforcement, staff levels and funding resources were a major factor in our evaluation of the feasibility of some of the options under discussion.

The small size of our staff, our limited financial resources, and the number of large active cases limited our ability to constantly supervise the "workout" at Clinton Memorial.

STATEMENT (Page 33)

In the end, the Ombudsman has no concerns with the concept of the "work out."

RESPONSE

This statement appears to conflict with some of your other statements. On **Page 34** you state that

“if there is a lesson to be learned from the Clinton Memorial experience, it is that the Unit should not undertake any similar “work out” efforts unless it can proactively look for warning signs. As this experience showed, a ‘work out’ carries the risk that aggregate consumer losses can actually grow. Unless the Unit can ensure that won’t happen, it is not a risk worth taking.”

No method could be adopted that would *ensure* against additional consumer losses.

STATEMENT (Page 33)

Nevertheless, it appears Clinton Memorial’s pre-need customers were adversely affected in at least two, immeasurable ways:

- Financially - This includes three groups:
 - 1) Those who had paid on contracts for openings and closings or cash advance items received no credit from the new owner.
 - 2) The majority who had to make additional payment to get what they had previously purchased.
 - 3) Those who refused to accept the new owner’s credit offer and who didn’t get reimbursed by insurance claims.
- Emotionally - Considering that these customers were predominantly elderly, certainly many were adversely affected by the news that their pre-need payments had not been appropriately trusted.

Further, in order to rectify the problem, they had to decide whether to accept the new owner’s credit offer, or go through the process of filing an insurance claim.

The Ombudsman’s review indicates that for at least some of those customers, these adverse affects may have been avoidable and unnecessary.

RESPONSE

This section is unclear. These are the consequences of a bank foreclosure with a sale of the facilities to a new buyer, or similar event, where a new owner does not assume existing contracts. These are among the reasons why the Division believed a “workout” was worth consideration. The vast majority of the consumer losses would have occurred at any point in time upon a bank foreclosure. These are not consequences related to the workout attempt.

We are not aware of anything suggesting that the cemetery and funeral home were worth more in 1991 or 1992 than in 1993 or 1994 or that a bank foreclosure at those times would have resulted in a better offer to consumers. When Clinton Memorial was

sold, the bank holding the first mortgage lost money on their loan and the bank holding the second mortgage took a complete loss on their loan.

Mr. Gailbreath was attempting to sell the facility during this entire time period. We have documentation of sales negotiations as early as July of 1992. A review of travel records indicates that Mr. Britson attended a meeting in Clinton, Iowa, on August 13, 1992, regarding terms and conditions of a possible sale of Clinton Memorial.

The crux of this case, in our opinion, is that Mr. Gailbreath paid too much and borrowed too much when he purchased Clinton Memorial. He apparently did so based upon an assumption that he could generate strong pre-need sales. He did that. However, his decisions were also based upon an assumption that he would be able to factor those contracts (sell them to a bank at a discount) to generate current cash flow. He was unable to do that. As a result, he ended up utilizing trust assets to service his large debts and expenses. Potential purchasers did not believe that the facility warranted the price to satisfy existing debt and service existing contracts in light of the trust deficits.

STATEMENT (Page 34)

Unlicensed sales: The Unit should have detected these sales and memorialized them in a letter to Clinton Memorial putting it on notice that any further unlicensed sales would result in a hearing on whether to revoke its sales permit and/or request court-imposed remedies, such as a monetary fine.

RESPONSE

We note Meg Winslow Maffit's March 18, 1993, letter stating that "Clinton Memorial should not have made any preneed sales in 1992. If sales **were** made, however, failure to report those sales will greatly complicate the resolution of all pending matters. If any sales subject to Iowa Code 523A or 523E were made by Clinton Memorial in 1992, report these sales immediately." See **EXHIBIT FOUR**.

STATEMENT (Page 34)

Under the entire set of circumstances, the Ombudsman would not have expected the Unit to apply to district court for a receivership, based on the unlicensed sales. However, the Ombudsman would not have criticized such a move.

RESPONSE

The statement assumes that a receivership application would have been likely to succeed and ignores the fact that these types of receiverships are usually equivalent to a foreclosure or bankruptcy process.

It is clear that a receivership is an extraordinary remedy which courts are reluctant to grant unless other remedies have been tried and failed. The Bureau's experience in the Merle Hay Funeral Home case bears this out. Even with supporting employee testimony and checks written for trust payments that were intentionally not deposited, the court did not grant our request for a receivership. Furthermore, even when a court is willing to appoint a receiver, the problems are just beginning. A funeral home and cemetery is unlike most other businesses. You cannot simply close the doors and lock up shop. Who will preserve and maintain the cemetery grounds? Who will perform the embalming and other funeral services when a loved one dies? Who will bury Mom next to Dad? Although Bureau personnel could maintain and eventually return whatever trust funds and trust assets were present at Clinton Memorial, the Bureau did not have the resources to keep it running as a funeral home and cemetery.

The decision as to whether or not a receiver will be appointed during the pendency of litigation lies totally within the discretion of the court. **South Ottumwa Savings Bank v. Sedore**, 394 N.W.2d 349, (Iowa 1986). A receivership is an extraordinary remedy which is only justified in extreme cases. **Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.**, 999 F. 2d 314, (8th Cir. 1993). When you are seeking a receivership against a defendant in possession of the property, "equity always proceeds with extreme caution." **Thomas v. Timonds**, 179 Iowa 509, 159 N.W.2d 881, (1917). Although there is not a specific list of factors which must be met prior to appointing a receiver, a court should consider whether there are other adequate legal remedies or if a less drastic equitable remedy is available. **Aviation Supply Corp**, 999 F. 2d 314, (8th Cir. 1993).

STATEMENT (Page 34)

Little progress toward goals: The Unit should have relied upon this and the unlicensed sales as a basis for refusing to partially reinstate Clinton Memorial's establishment permit in the May 1, 1992 order. The Unit had a duty to expect Clinton Memorial to make significant progress and to honor the suspension order before it could earn any rewards.

RESPONSE

The Division does not dispute the need to monitor progress and take actions as necessary. That is why, on July 30, 1992, the Unit issued a notice citing the lack of progress. It set a hearing for September 10, 1992, to determine if there was good cause to revoke Clinton Memorial's establishment permit. The fact that you disagree with some items that we considered to be significant progress does not negate our decision-making process. Actually, it means you are substituting your judgment for ours.

INDEX OF CASES

Albert Elia Building Co., Inc. v. Sioux City, Iowa, 418 F. Supp 176 (N.D. Iowa 1976)

This case involved a dispute between two competing bidders for a wastewater treatment works improvement project. The low bid was alleged to be non-responsive to certain bid specifications. The EPA's regional counsel decided that it was responsive and accepted that low bid.

The Court was required to find "that the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. ... To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." The Court went on to state that "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

The Court upheld the Administrator's decision.

Allen v. State of Iowa, Department of Transportation, 528 N.W.2d 583 (Iowa 1995)

Two livestock compliance investigators with the State Department of Agriculture sought judicial review of their job classification, after a classification appeals committee refused to reclassify them as compliance officers. The Court stated "Under section 17A.19(8), relief may be granted only if agency action was 'unreasonable, arbitrary or capricious' or is characterized by abuse of discretion.... To constitute abuse of discretion, the action must be unreasonable and lack rationality...."

The Court upheld the agency's decision.

Churchill Truck Lines, Inc. v. Transportation Regulation Board, Etc., 274 N.W.2d 295 (Iowa 1979)

The Plaintiff in this case, Churchill, filed a unilateral application for acquisition of a motor vehicle carrier's operating rights upon application for a transfer of those rights by a competing carrier. Churchill argued that the Transportation Board 1) lacked jurisdiction because it had not published notice of the proceedings and 2) took actions that were unreasonable, arbitrary, and capricious, and were not supported by sufficient evidence.

The Board had never interpreted the statute to require notice of a proposed transfer. The Court held that this interpretation of the statute by the agency charged with its implementation, "particularly over a long period of time, and without legislative intervention, is evidence of compatibility of that agency's interpretation with legislative intent."

The Court stated that “unreasonable” is “said to mean action in the face of evidence as to which there is no room for difference of opinion among reasonable minds” or “not based on substantial evidence.”

The Court upheld the Board’s decision.

Citizens’ Aide/Ombudsman v. Rolfes, 454 N.W.2d 815 (Iowa 1990)

A county sheriff challenged an investigation by the Office of Citizens’ Aide. The Court held that the office was an “agency” and that its actions investigating the sheriff “were not shown to be unreasonable” and that the investigation was not “an abuse of discretion.” The Court stated that “there is nothing in the mandate of Citizen’s Aide’s authority which suggests that it lacks authority to conduct such investigations.”

The Court held in favor of the agency.

Empire Cable v. Department of Revenue & Finance, 507 N.W.2d 705 (Iowa Ct. App. 1993)

The Department of Revenue revoked a cable television company’s sales tax permit for failure to timely pay retail sales tax and following violation of two previous orders. The Court found substantial evidence to support the Department’s decision. The Court stated that relief would have required a finding that agency’s decision was “unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.” The Court stated that “arbitrary, capricious, and unreasonable mean action which is premised on a lack of rationality and focuses on whether an agency has made a decision clearly against reason and evidence.”

The Court upheld the agency’s decision.

Equal Access Corporation v. Utilities Board, 510 N.W.2d 147 (Iowa 1993)

The Utilities Board found that a telephone company had failed to file a tariff and imposed a refund of all revenues received by the company during the prior twelve-month time period. The Court held that the Utilities Board did not abuse its discretion in ordering this refund. The Court stated that “an agency is free to exercise its expertise within a reasonable range of informed discretion.... Discretion is abused when it is exercised on clearly untenable grounds or to a clearly unreasonable extent.

The Court upheld the agency’s decision.

Frank v. Iowa Department of Transportation, 386 N.W.2d 86 (Iowa 1986)

In this case, the Department of Transportation appealed a District Court’s decision that the agency’s actions were “unreasonable” and an “abuse of discretion” when the agency considered Frank’s failure to have a valid chauffeur’s license while driving a tow truck to be a moving traffic law violation and, thus, a violation of his probation.

The Court states that the terms “unreasonableness” and “abuse of discretion” are synonymous and are both “premised on lack of rationality, and focuses on whether the agency has made a decision clearly against reason and evidence.” In reversing the lower court’s decision and finding in favor of the agency, the Court further stated that an abuse of discretion can only be found “when such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.”

The Court upheld the agency’s decision.

Rowen v. LeMars Mutual Insurance Company of Iowa, 357 N.W.2d 579 (Iowa 1984)

This case involved the decision of a district court to impose temporary restraints on election procedures to ensure the stability of the insurer during a transition period in which the company was moving from an interim board to an elected board. In a prior decision, the Court held that it was “the responsibility of the Court to fashion unusual relief to meet unusual circumstances. Since the district court was charged with the duty to supervise this transition, the Court held that the lower court’s actions were not unreasonable. The Court noted that an abuse of discretion is found “only when such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.”

The Court upheld the lower court’s decision.

Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595 (Iowa 1997)

The Court found an abuse of discretion by the Industrial Commissioner’s decision to exclude a doctor’s evaluation report because it was not filed within the time period specified in the hearing assignment order. The Court noted that this type of “ruling rests on grounds or reasons clearly untenable or unreasonable....In other words, ‘abuse of discretion’ is synonymous with unreasonableness, and involves lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence.” In explaining its decision, the Court noted that an action excluding evidence “is the most severe sanction available under Iowa Rule of Civil Procedure 125 (c), the rule concerning discovery of experts, and is justified only when prejudice would result.”

The Court found an abuse of discretion.

Soo Line Railroad Company v. Iowa Department of Transportation, 521 N.W.2d 685 (Iowa 1994)

The case involved a decision by the Department of Transportation to grant a request by the City of Spencer for an additional railroad crossing. The Court stated that an agency’s action “is ‘unreasonable’ when it is ‘clearly against reason and evidence.’ ”

The Court upheld the agency’s decision.

Stephenson v. Furnas Electric Co., 522 N.W.2d 828 (Iowa 1994)

The Court stated “.... We are not free to interfere with any agency finding where there is a conflict in the evidence or when reasonable minds might disagree about the inference to be drawn from the evidence, whether it is disputed or not.... Unreasonableness is defined as action in the face of evidence as to which there is no room for difference of opinion among reasonable minds, or not based on substantial evidence.... Abuse of discretion is synonymous with unreasonableness, and involves lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence.”

The Court upheld the Commissioner’s decision.

ANNUAL REPORT
BY AN
ESTABLISHMENT(S)

EXHIBIT

4

THE IOWA PREARRANGED FUNERAL CONTRACTS ACT

This report must be filed with the Iowa Securities Bureau, Lucas State Office Building, Des Moines, Iowa 50319, not later than March 1 of each year. The information requested below shall be provided for the preceding calendar year, as specified below.

CALENDAR YEAR 1992

1. Name(s), address(es) and permit number(s) of establishment(s):

CLINTON MEMORIAL PERMIT NUMBER: EP90-88008
2600 LINCOLNWAY
PO BOX 548
CLINTON, IA 52733-0548

Contact Person: SHAWN M. DAKE

Telephone Number: (319)242-0853

2. Name(s), address(es) and permit number(s) of the establishment(s) that will provide the funeral services of merchandise:

SAME AS ABOVE

3. Sales and Trust Data:
- | | 523A | 523E |
|--|--------------|-------------|
| | ---- | ---- |
| a. The total dollar value of agreements entered into during the year for which you are reporting: | \$15,320.58 | \$ 0.00 |
| b. The total dollar amount of payments the seller received pursuant to those agreements during the year for which you are reporting: | \$ 14,120.58 | \$ 0.00 |
| c. The total dollar amount of funds deposited in trust pursuant to those agreements during the year for which you are reporting: | \$ 0.00 | \$ 0.00 |
| d. The total dollar amount of any payments received pursuant to agreements reported in previous years: | \$176,907.07 | \$12,642.00 |
| e. The total dollar amount of payments reported in subparagraph "d" which were deposited in trust during the year for which you are reporting: | \$ 0.00 | \$ 1,392.11 |
| f. The combined total of new agreements for funeral services and the number of sales for cemetery merchandise in 1992: | | 5 |

FILING FEE: 5 * \$10.00 = \$50.00

016826

ANNUAL REPORT
BY AN
ESTABLISHMENT(S)

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2600 LINCOLNWAY
PO BOX 548
CLINTON, IA 52733-0548

041531

Contact Person: SHAWN M. DAKE

Telephone Number: (319)242-0853

RECEIVED
MAR 17 1993
IOWA SECURITIES DIV.

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TERRY E. BRANSTAD, GOVERNOR

David J. Lyons, Commissioner

INSURANCE DIVISION
IOWA DEPARTMENT OF COMMERCE

March 18, 1993

J. William Gailbreath
Clinton Memorial Park Cemetery
and Funeral Home
P.O. Box 548
Clinton, IA 52733

Dear Mr. Gailbreath:

Please direct your attention to the following matters:

1. The Revised Order of Supervision and Agreement, dated January 22, 1993, requires that if your internal audit is not completed by March 15, 1993, \$50,000 shall be transferred into Clinton Memorial's trust account. Please send documentation to this office showing the deposit of \$50,000 into trust.

2. We have finally received the 1992 Annual Report for Memory Gardens in Iowa City. Clinton Memorial should not have made any preneed sales in 1992. If sales were made, however, failure to report those sales will greatly complicate the resolution of all pending matters. If any sales subject to Iowa Code 523A or 523E were made by Clinton Memorial in 1992, report those sales immediately.

3. Memory Gardens still owes \$1,000 toward the audit conducted by the Iowa Insurance Division. This obligation should be paid immediately.

4. Describe, in writing, the insurance funding program currently utilized by both Clinton Memorial and Memory Gardens. Specifically include an explanation of the method used to calculate the amount of insurance purchased for each consumer.

192230

Please promptly respond, in writing, to each item listed above. Your response should be received by me no later than March 29, 1993. If you have any questions, you may contact Dennis Britson or me.

Sincerely,

Meg Winslow Maffitt
Enforcement Attorney

SECURITIES BUREAU

INSURANCE DIVISION / LUCAS BUILDING / DES MOINES, IOWA 50319 / 515-281-4441